DOCKET

No. 08-1175

Title:	Florida, Petitioner v. Kevin Dewayne Powell
Docketed:	March 23, 2009
Lower Ct:	Supreme Court of Florida
Case Nos.:	(SC07-2295)
Decision Date:	September 29, 2008
Rehearing Denied:	December 23, 2008

Questions Presented

Date	Proceedings and Orders
Mar 19 2009	Petition for a writ of certiorari filed. (Response due April 22, 2009)
Mar 20 2009	Application (08A834) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Thomas.
Mar 25 2009	Response to application for stay from respondent Kevin Dewayne Powell filed.
Apr 2 2009	Application (08A834) referred to the Court.
Apr 2 2009	Application (08A834) granted by the Court. The issuance of the mandate of the Florida Supreme Court, case No. SC07-2295, is stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.
Apr 22 2009	Brief of respondent Kevin Dewayne Powell in opposition filed.
Apr 22 2009	Motion for leave to proceed in forma pauperis filed by respondent Kevin Dewayne Powell.
May 5 2009	DISTRIBUTED for Conference of May 21, 2009.
May 15 2009	Reply of petitioner Florida filed. (Distributed)
May 19 2009	DISTRIBUTED for Conference of June 4, 2009.
Jun 8 2009	DISTRIBUTED for Conference of June 11, 2009.
Jun 15 2009	DISTRIBUTED for Conference of June 18, 2009.
Jun 22 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 22 2009	Petition GRANTED.
Jul 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 27, 2009.
Aug 27 2009	Joint appendix filed.
Aug 27 2009	Brief of petitioner Florida filed.
Sep 3 2009	Brief amicus curiae of United States filed.
Sep 8 2009	The time within which to file the respondent's brief on the merits is extended to and including October 23, 2009.
Sep 28 2009	SET FOR ARGUMENT ON Monday, December 7, 2009
Sep 29 2009	CIRCULATED
Oct 23 2009	Brief of respondent Kevin Dewayne Powell filed. (Distributed)
Oct 28 2009	Brief amicus curiae of Florida Public Defender Association, Inc. filed. (Distributed)
Oct 29 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 29 2009	Brief amicus curiae of Florida Association of Criminal Defense Lawyers filed. (Distributed)
Oct 30 2009	Brief amicus curiae of Professor Richard A. Leo filed. (Distributed)
Oct 30 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Nov 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 10 2009	Record received from Supreme Court of Florida. (1 box)
Nov 23 2009	Reply of petitioner Florida filed. (Distributed)
Dec 7 2009	Argued. For petitioner: Joseph W. Jacquot, Deputy Attorney General, Tallahassee, Fla.; and David O'Neil, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Deborah K. Brueckheimer, Assistant Public Defender, Bartow, Fla.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-1175 MAR 19 2009

OFFICE OF THE CLERK
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Case No.:

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA
Petitioner,
v.
KEVIN DWAYNE POWELL
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION, CONFLICTS WITH *MIRANDA v. ARIZONA* AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

II

AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

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II. AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING? 20

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OPINION BELOW

The opinion below is reported as *State of Florida v. Kevin Dewayne Powell*, 998 So. 2d 531 (Fla. 2008), and is contained in the appendix at A1-A34. The relevant trial court proceedings and orders are unpublished.

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion on Sept. 29, 2008, and issued a revised opinion on Dec. 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent, Kevin Dewayne Powell, was charged by information with felon in possession of a firearm, in violation of section 790.23(1), Florida Statutes (2004), for events occurring on August 10, 2004, in Hillsborough County, Florida.

Tampa Police Department Officer Salvatore Augeri testified that Powell was arrested and taken to the police department, where he was advised of his *Miranda*[1] warnings. The following warnings given to Powell were contained on the Tampa Police Department Consent and Release Form, which was signed by Powell and received into evidence:

> You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Officer Augeri testified Powell willingly agreed to talk with them. However, when the prosecutor asked Officer Augeri if Powell made any statements, the defense attorney objected to the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

validity of the *Miranda* warnings on the basis the standard form provides that the defendant has the right to have an attorney present before the questioning, but not during. The trial court overruled the objection, stating, "I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection."

Officer Augeri testified that Powell confessed that he owned the firearm and carried it for protection. The officer also testified they did not threaten Powell or coerce him in any way to give his statement.

Powell testified at trial and admitted he has been convicted of ten prior felonies, as well as one crime involving dishonesty. Powell acknowledged he signed the waiver of his rights and consented to be interviewed. The defense attorney specifically inquired as follows:

> DEFENSE ATTORNEY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?
>
> RESPONDENT: Yes.

(V2/T150).

The jury found Respondent guilty of the charge of felon in possession of a firearm, but did not find him to be in actual possession of the firearm. He appealed his convictions and sentences to the Second District Court of Appeal, Florida,

arguing the *Miranda* warnings he was given were deficient pursuant to the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.

In *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007), two judges of a three-judge panel of the Second District Court of Appeal, agreed and reversed his conviction and remanded the case for further proceedings. Judge Kelly, concurring in part and dissenting in part, observed:

> Properly framed, the test for reviewing the adequacy of the warnings provided by law enforcement to an individual taken into custody "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)). In my view, Mr. Powell was not deprived of any information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by *Miranda*," I respectfully dissent from the majority opinion to

> the extent that it holds otherwise. *See id.* at 203, 205. Although the majority's thoughtful analysis of the issue is not without persuasive force, I believe the reasoning detailed in Judge Canady's opinion in *M.A.B. v. State*, 957 So. 2d 1219 (Fla. 2d DCA 2007), is more in line with the body of precedent the Supreme Court has provided for guidance on this issue, and accordingly, I adopt that reasoning as my own. I fully concur, however, with the majority's conclusion that, in light of this court's evenly divided opinion in *M.A.B.*, it is appropriate for this panel to address the issue of the adequacy of the *Miranda* warnings Mr. Powell received.

The majority however, relied heavily upon an earlier, evenly split *en banc* decision, in *M.A.B. v. State*, 957 So. 2d 1219 (Fla. Dist. Ct. App. 2007), and concluded "Although decisional law has not prescribed talismanic warning language, we conclude the warning given to Mr. Powell did not comply with the dictates of *Miranda* and its progeny. Critical in this analysis is *Miranda's* mandate that a suspect be told that he or she has the right to the presence of an attorney. This is the overarching right from which the right to talk to or consult with an attorney flows. Advising a suspect that he or she has the right "to talk to a lawyer before answering . . . any of our questions"

constitutes a narrower and less functional warning than that required by *Miranda*." (Footnote in text omitted).[2]

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[2] In *M.A.B. v. State*, 957 So. 2d 1219 (Fla. Dist. Ct. App. 2007), the Florida Second District Court of Appeal, en banc, based upon the same warnings at issue in the instant case, was evenly split on the question of the adequacy of the warnings.

However, Judge Altenbernd of the Florida Second District Court of Appeal aptly observed, in yet another case, that "Miranda warnings are not, as a general rule, read to English majors or philosophers studying theoretical linguistics." *Mitchell v. State*, 32 Fla. L. Weekly D2958, 2959 (Fla. Dist. Ct. App. 2007). He concluded that the form found to be deficient in *Powell* accomplishes the critical function of *Miranda*:

> to communicate by both words and actions to a person of average intelligence (1) that the giving of a statement to the police can have serious legal consequences, (2) that the person is not obligated to provide the statement, (3) that the matter is serious enough that the person may need to consult with a lawyer, and (4) that the State will provide a lawyer upon request and without continuing questioning if the person indicates he wants one and cannot afford one.

The State of Florida sought review in the Supreme Court of Florida. The Supreme Court of Florida accepted jurisdiction, *State v. Powell*, 973 So. 2d 1123 (Fla. 2008), and after briefing and oral argument affirmed the opinion of the district court. The Florida Supreme Court held the *Miranda* warnings informing a defendant he had the right to talk with a lawyer before questioning, and that he could use that right at any time during the interview, were insufficient to inform him of his right to have counsel present during questioning as required by the principals espoused in this Court's decision in *Miranda* and the protections given by the Fifth Amendment. The Florida Supreme Court has misinterpreted this Court's holding in *Miranda* to require a suspect be *expressly* advised of his right to counsel during questioning. *State v. Powell*, 998 So. 2d 531 (Fla. 2008).

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the United States Constitution guarantees all individuals the right against compelled self-incrimination. This Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), in considering the privilege against self-incrimination, established certain procedural safeguards to protect individual's rights under the Constitution's Fifth and Fourteenth Amendments before commencing custodial interrogation. This Court stated, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution, but are measures set out to insure that the right against compulsory self-incrimination is protected. Therefore, reviewing courts need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. In the years since the *Miranda* decision, this Court has held *Miranda* did not require of, nor impose upon, law enforcement a rigid and precise formulation of the warnings given a criminal defendant. *California v. Prysock*, 453 U.S. 355 (1981); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)(courts should consider if the language is adequate to safeguard the right not to incriminate oneself).

The inquiry is whether the warnings, such as the following recited in this case:

> You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

reasonably convey to a suspect his or her rights as required by *Miranda*. However, Federal courts of appeal and state courts of last resort are divided on the issue of whether this Court's holding in *Miranda* require a defendant to be *expressly* advised of his right to counsel during questioning. This Court's resolution of this recurring conflict among the courts of this country is crucial.

I

THE DECISION OF THE FLORIDA SUPREME COURT ADDS TO THE RECURRING CONFLICT AMONG STATE AND FEDERAL COURTS REGARDING THE PROPER INTERPRETATION OF THIS COURT'S DECISION IN *MIRANDA* AND ITS PROGENY.

A. Courts Holding that *Miranda* Entitles a Suspect to be Expressly Advised of the Right to Have Counsel Present During Custodial Questioning.

There is a split among the different federal circuits with respect to whether informing a suspect that he has a right to an attorney prior to questioning effectively conveys that counsel may remain during questioning. Depending on the circumstances, federal courts have reached varying conclusions on the necessity for express warnings of the right to have counsel present during interrogation. The Fifth, Sixth, Ninth and Tenth Circuits have held that a suspect is entitled to be expressly informed of the right to have an attorney present during questioning. *United States v. Windsor,* 389 F.2d 530, 533 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 127, 140-42 (6th Cir. 1992); *United States v. Noti,* 731 F.2d 610, 615 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981).

However, recently in the context of an ADEPA petition, the Fifth Circuit, in *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), *cert denied*, 548 U.S. 909, 126 S.Ct. 2961, 165 L.Ed.2d 959 (2006), held that warnings which informed a defendant he had the right to presence of counsel prior to questioning but was not explicitly told of right to counsel during questioning, were adequate and not an unreasonable application of federal law requiring federal habeas relief. Although, the court did recognize its prior decision in *Atwell v. United*

States, 398 F.2d 507, 510 (5th Cir. 1968), in which it held a suspect must be expressly warned of the right to presence of counsel during interrogation, to be binding precedent for cases on direct appeal.

Notably, this Court denied Bridgers's petition for certiorari review. In doing so, Justices Breyer, Stevens, and Souter issued the following statement, "Although this Court has declined to demand 'rigidity in the form of the required warnings,' *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (per curiam), the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element." *Bridgers v. Texas*, 532 U.S. 1034 (2001).

Justice Breyer further commented in *Bridgers* that, "Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention." *Id.*

In the eight years since this Court denied Bridgers's petition for certiorari review, the purported problem continues to be a recurring one, and there is clearly a need for a resolution from

this Court to the existing division among the courts across the country.

B. Courts Holding *Miranda* Warnings Adequate When Suspect is not Specifically Advised of Right to Presence of Counsel During Police Questioning.

The Second, Fourth, Seventh and Eighth Circuits, have found sufficient *Miranda* warnings that did not specifically advise a suspect of his right to have an attorney present during interrogation. *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982); *United States v. Frankson*, 83 F.3d 79, 81-82 (4th Cir. 1996); *United States v. Caldwell*, 954 F.2d 496, 500-04 (8th Cir. 1992).

The Seventh Circuit, in *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973), held that a suspect had been Mirandized effectively despite the fact that the warnings he received did not inform him of his right to have an attorney present during questioning. In *Adams*, the court cited to *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), in which the Second Circuit found sufficient the *Miranda* warnings that did not specifically inform a suspect of his right to counsel during questioning, but did inform him of his right to remain silent and to refuse to answer questions, that if he did not have an attorney one would be provided without cost, and that anything he said could be used against him in court. *Adams*, 484 F.2d at 362.

As such, it seems the Seventh Circuit has acknowledged that the failure to expressly tell a suspect that he has the right to have an attorney present during questioning does not render *Miranda* warnings constitutionally deficient when, collectively, the warnings made this right clear. *Id.*

The Fourth Circuit affirmed the district court's holding in *Young v. Warden, Maryland Penitentiary*, 383 F. Supp. 986 (D. Md. 1974), *aff'd*, 532 F.2d 753 (4th Cir. Md. 1976), *cert. denied*, 425 U.S. 980 (1978), which considered the defendant's allegation that he was not informed of his right to have counsel present during interrogation. The officer who gave the *Miranda* warnings testified that the defendant was advised of his right to remain silent; that the defendant could get a lawyer of his own choosing; and that if the defendant could not afford a lawyer, the police were obliged to obtain one for him. *Id.* The officer also testified that he warned the defendant on another occasion that the defendant did not have to say anything further and that the police would get an attorney if the defendant had no means to obtain one.

The court, in dismissing the habeas petition of the defendant, found the defendant had been adequately advised of his right to have counsel before and during any questioning. *Id.* The court reasoned that the defendant was adequately advised of an unqualified right to an attorney at any time, and the failure to expand the warning to

include an express "here and now" was not fatal logically, particularly in view of this Court's approval in *Miranda* itself of the FBI warnings that omitted these rubric words. *Young*, 383 F. Supp. at 1005. In making its determination the court found, "As to what is necessary effectively to convey the substance of the *Miranda* warnings, several of the courts have taken what appears to this Court to be hypertechnically narrow approaches." *Id.* at 1001.

The court in *Young* found the opinion by the Second Circuit in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), to misconstrue *Miranda*, in which the Second Circuit ruled the warnings given to Fox gave no indication that he was entitled to have an attorney present during questioning, although he was told that he could consult an attorney prior to any questioning. *Young*, 383 F. Supp. at 1001-1002. The *Young* court found the dissent in *Fox* to be persuasive and cited the following from that opinion:

> The second deviation found by the majority from their conception of *Miranda* standards is that Fox was only told that 'he could consult an attorney prior to any question,' whereas he should have been told that he had 'the right to the presence of an attorney.' But if he had the right to consult an attorney 'prior to any question', the attorney could have prevented any interrogation without

> his being present or any interrogation at all.

Young, 383 F. Supp. at 1002, *citing United States v. Fox*, 403 F.2d at 104-105 (Moore, J., dissenting).

Two years after *Fox*, the Second Circuit addressed the adequacy of *Miranda* warnings in *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), *cert. denied*, 400 U.S. 907 (1970), in which the defendant was told he had the "right to an attorney" and if he was not able to afford an attorney one would be appointed by the court.

Lamia argued the warning did not apprize him of his right to the "presence" of an attorney during questioning. *Id.* However, the Second Circuit held otherwise and found that Lamia had been told without qualification of his right to an attorney and that one would be appointed if he could not afford one. *Id.* In viewing the statement in context, in which Lamia was just informed he did not have to make any statement to the agents, the court found Lamia was effectively warned that he need not make any statement until he had the advice of an attorney. *Lamia*, 429 F.2d at 376-77.

Additionally, in *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996), the Fourth Circuit found the officer's notification to the defendant that he had a right to an attorney was sufficient, and the officer need not have specified the right to an attorney applied both prior to and during interrogation. The court found the notification

informed the defendant of his immediate right to an attorney with no time restrictions, and that the right "continued forward in time without qualification." *Id.* at 82. The court stated, "*Miranda* and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately list all possible circumstances in which *Miranda* rights might apply." *Id.* at 82. The court concluded that satisfaction of *Miranda* does not depend on the precise formulation of the warnings, but on whether the officer reasonably conveyed the general rights enumerated in *Miranda* to the suspect. *Id.*

Several state and federal courts have upheld warnings in which the suspect was advised that he had the right to consult with an attorney prior to any questioning. In *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found such warnings sufficient because it was, "unreasonable to assume ... that [the defendant] would not have requested the [p]resence of an attorney while he answered the police officer's questions." See also *United States v. Vanterpool*, 394 F.2d 697, 699 (2d Cir. 1968)(validity of *Miranda* warnings upheld where defendant was advised he had the right to consult with a lawyer, "at this time"); *United States v. Anderson*, 394 F.2d 743, 746-47 (2d Cir. 1968)(defendant advised he had right to attorney at that time was considered sufficient warning pursuant to *Miranda*).

The court in *Young v. Warden, Maryland Penitentiary*, 383 F. Supp. 986 (D. Md. 1974), *aff'd*, 532 F.2d 753 (4th Cir. Md. 1976), *cert. denied*, 425 U.S. 980 (1978), reasoned that:

> ... a strong argument can be made that the ordinary accused might well be confused as to the meaning of the warning that he was entitled to have an attorney with him during questioning and that one could be appointed for him, but not until he went into court; but that he could answer questions in advance of such appointment.

Id. at 1004.

The Supreme Court of Illinois found sufficient *Miranda* warnings that informed a defendant he had a right to remain silent and did not have to give a statement, followed by the advice that he had a right to have counsel present. The court determined that the defendant was clearly told he had a right to have an attorney present at the contemplated interrogation and not some future time. *People v. Prim*, 289 N.E. 2d 601 (Ill. 1972). *See also, People v. Johnson*, 282 N.W. 2d 340 (Mich. App. 1979)(holding advising a defendant he has "a right to have an attorney present" cannot reasonably be understood otherwise than as

informing the defendant of his right to counsel during interrogation and not at some future time).

Additionally, in an unpublished opinion the Eleventh Circuit Court of Appeal, in considering *Miranda*, noted:

> Importantly, the Supreme Court has never insisted *Miranda* warnings be given in the exact form described in that decision. In *California v. Prysock*, the Supreme Court stated the rigidity of *Miranda* does not extend "to the precise formulation of the warnings given a criminal defendant," and "no talismanic incantation [is] required to satisfy its strictures." 453 U.S. 355, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981). Therefore, the inquiry is simply whether the warnings reasonably "conveyed [to a suspect] his rights as required by *Miranda*." Id. at 2810.

United States v. Harris, 151 Fed. Appx. 882, 885 (11th Cir. 2005).

In *Harris* the court further reasoned, "[a] waiver is effective where the 'totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension.'" *Harris*, 151 Fed. Appx. at 885.

citing, *Moran v. Burbine*, 475 U.S. 412 (1986)(quotation omitted).

C. The *Miranda* Court

This Court has never explicitly held that to protect a defendant's Fifth Amendment rights, he must be expressly advised that he has the right to the presence of counsel *during* custodial questioning. In fact, in *Miranda*, this Court stated:

> Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.

Miranda, 384 U.S. at 483-84.

Although no reference is made to the right to have counsel present during questioning, this Court stated that "...the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is

consistent with the procedure which we delineate today." *Id.* at 483-84.

The Florida Supreme Court, and other courts in interpreting a defendant's federal constitutional right to be explicitly informed of his right to have counsel present during custodial questioning, is demanding more from law enforcement than this Court ever envisioned or deemed necessary in *Miranda* and its progeny in order to protect individuals' Fifth Amendment rights. And thus has eliminated otherwise valid confessions resulting in the unnecessary exclusion of critical evidence, resulting in an even more unreasonable narrowing in the application of the exclusionary rule.

II

AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Furthermore, this *Miranda* assessment of constitutionally mandated rubric contorts reasoning to suggest the warnings given to Respondent in the instant case did not reasonably convey his right to have his attorney present

during questioning. Only based on a strained, literalistic reading, inattentive to context, could the warnings given to Respondent be interpreted as implying that he could talk to a lawyer before questioning and at any time during questioning, but could not have a lawyer present during questioning. While the warnings at issue may not be the most elegant formulation of *Miranda* warnings, the test is reasonable clarity, not elegance. The language in this case meets the reasonable clarity test.

While cognizant that the admission of statements obtained in violation of *Miranda*, are subject to a harmless error analysis, whether analyzed under *Chapman v. California*, 386 U.S. 18 (1967), or *Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), the Court has identified the instant "constitutional error" as "trial error," not a "structural error," subject to "harmless error" analysis. Under either standard, the erroneous opinion of the Supreme Court of Florida, that the admission of Powell's confession was harmless beyond a reasonable doubt, demonstrates the absurd result which followed based upon the court's conclusion that "with the exception of Powell's unwarned statements, the evidence does not establish that Powell committed the crime of possession of a firearm."

From a practical viewpoint, otherwise valid confessions are being suppressed because courts are continuingly interpreting *Miranda* differently.

The division among the courts is so intense it has created intra-circuit conflict as in *Bridgers*, in which the *Miranda* warnings were found to be inadequate on direct appeal but found to be sufficient to satisfy the standards of a federal habeas petition.

In order to resolve the ongoing conflict in state and federal courts regarding this issue, and provide guidance to law enforcement and those subjected to custodial interrogation, this Court should grant a writ of certiorari in this case and resolve what will continue to be a problem plaguing the application of *Miranda*.

CONCLUSION

For the foregoing reasons the writ should be granted.

Respectfully Submitted,

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APPENDIX

Supreme Court of Florida

No. SCO7-2295

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN DEWAYNE POWELL,

Respondent.

[September 29, 2008]
REVISED OPINION

QUINCE, C.J.

This case is before the Court for review of the decision of the Second District Court of Appeal in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007). In its decision the district court ruled upon the following question, which the court certified to be of great public importance:

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA[1] WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Id. at 1067-68. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons explained below, we answer the question in the affirmative and approve the decision below.

FACTS AND PROCEDURAL HISTORY

In Powell, 969 So. 2d 1060, the Second District Court of Appeal summarized the facts as follows:

> On August 10, 2004, Tampa Detectives Salvatore Augeri, Randy Estevez and other officers went to a residence in Tampa to investigate Mr. Powell. Shazeena West, Mr. Powell's girlfriend, allowed the officers to enter her apartment. Mr. Powell was one of at least four adults present in the apartment when police arrived. He was in the upstairs hallway coming from near the southeast corner bedroom. The

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

officers searched that bedroom and under the bed found a loaded nine-millimeter handgun. Mr. Powell was arrested and transported to Tampa Police headquarters where he was questioned after being advised of his rights under Miranda. According to police, Mr. Powell agreed to talk.

During the direct examination of Detective Augeri, prior to his testimony concerning statements that Mr. Powell allegedly made, defense counsel objected on the ground that the Miranda warning was invalid. The trial court allowed defense counsel to voir dire the witness. The subsequent testimony revealed that the standard police department Form 310 used during the interrogation of Mr. Powell did not explicitly indicate that he had the right to have an attorney present during questioning. Detective Augeri testified that he witnessed another officer read Form 310 verbatim to Mr. Powell. The written warning, which was introduced at trial as an exhibit, states as follows:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any

of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

A bench conference was held, and the court ruled that the recitation concerning the right to an attorney before questioning was adequate. The detective then testified that Mr. Powell said the firearm was his and that he had purchased it on the street and carried it for protection, even though he was a convicted felon. Defense counsel renewed her objection to admitting Mi. Powell's custodial statement. The trial court overruled this objection. Mr. Powell then testified in his own defense. He said that he did not live at the apartment on August 10, 2004, but he heard a commotion when the officers entered. He said he was handcuffed and taken into custody. He testified he did not know the gun was present under the bed because he only stayed at that address every once in a while. Mr. Powell was convicted and sentenced to ten years in prison.

Powell, 969 So. 2d at 1063-64 (footnotes omitted).

On appeal, the Second District reversed Powell's conviction. See Powell, 969 So. 2d at 1068. The court held that the Miranda warnings that were given to Powell were deficient under the Fifth Amendment of the United States Constitution and article I, section 9 of the Florida Constitution. See Powell, 969 So. 2d at 1061. The warning did not comply with the dictates of Miranda and its progeny. See Powell, 969 So. 2d at 1064. The court reasoned that to advise a suspect that he "has the right 'to talk to a lawyer before answering. . . any of our questions' constitutes a narrower and less functional warning than that required by Miranda." Powell, 969 So. 2d at 1064. The court further noted that Miranda requires that a suspect be "clearly informed" of his right to have a lawyer with him during questioning. See Powell, 969 So. 2d at 1067 (citing Miranda, 384 U.S. at 471). The court further reasoned that the warning given to Powell was constitutionally flawed because "the right to talk to or consult with an attorney before questioning is not identical to the right to the presence of an attorney during questioning." Id. The court further reasoned that the language, "right to use any of these rights at any time . . . during this interview," cannot cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation. Id. Moreover, concerning the language used in the warning, the court focused on whether at the moment given the language clearly communicated the right to have an attorney present during questioning and not how the words might be analyzed afterwards. See id.

Pursuant to article V, section 3, subsection (b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the Second District certified the question as one of great public importance. See Powell, 969 So. 2d at 1067-68. We granted review to answer the certified question.

ANALYSIS

The issue before this Court is whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in Miranda v. Arizona, 384 U.S. 436 (1966). Powell argues that the trial court erred in failing to grant his motion to suppress because the Miranda warnings that were given were inadequate. In reviewing a motion to suppress, this Court has explained:

> An appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence. Appellate review of the trial court's application of the law to the historical facts is de novo. Accordingly, "appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the. . . Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution."

Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007) (citations omitted) (quoting Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005)).

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." To ensure compliance with the privilege against self-incrimination, the United States Supreme Court outlined in Miranda v. Arizona four procedural safeguards that must be employed to protect the privilege when an individual has been deprived of freedom during a custodial interrogation:

> He must be warned prior to any questioning that [1] he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479 (emphasis added). In explaining the reasons for an expansive reading of the Fifth Amendment, the Supreme Court said:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to

> have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 469-70 (emphasis added). The Court unequivocally said that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Id. at 471. The Court noted that the individual's opportunity to exercise these rights must be afforded throughout the interrogation. See id.

1. The General Scope of the Miranda Warnings

In applying the Miranda principles, the Supreme Court has said that Miranda does not mandate that the warnings be a "virtual incantation of the precise language contained in the Miranda opinion." California v. Prysock, 453 U.S. 355, 355 (1981). Moreover, in Duckworth v. Eagan, 492 U.S. 195 (1989), the Supreme Court further said that

"[r]eviewing courts ... need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda." Id. at 203 (quoting Prysock, 453 U.S. at 361).

Similarly, to ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution, this Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992), outlined the following rights Florida suspects must be told of prior to custodial interrogation:

> [1] they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help[2], and [4] that if they cannot pay for a lawyer one will be appointed to help them.

Id at 966 (footnote omitted); see also Cuervo, 967 So. 2d at 160 (reiterating the Miranda warnings). In Anderson v. State, 863 So. 2d 169 (Fla. 2003), we further noted, "Although Miranda warnings must be given to suspects before custodial interrogation can begin, there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, as long as the warnings are not misleading." Id. at 182. However, we also unequivocally said that

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[2] This Court explained that "help" means "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." Traylor, 596 So. 2d at 966 n. 13.

the help of an attorney includes both the right to consult with an attorney before questioning and the right to have an attorney present during questioning. Traylor, 596 So. 2d at 966 n.13.

2. Express Mention of the Presence of Counsel

In Miranda, the Supreme Court discussed with apparent approval the FBI's standard warning form. See 384 U.S. at 484-85. The standard warning did not expressly advise a suspect of the right to the presence of counsel during questioning. See id. The Court found that the warnings advised the suspects of their constitutional rights. See id. However, the Court additionally noted that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)). Despite this seeming approval of the FBI warnings, the Court suppressed all of the confessions or statements that were given in the four cases before the Court in Miranda. For example, in the case involving the defendant Miranda, the Supreme Court reversed his conviction and said, "[I]t is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled

to incriminate himself effectively protected in any other manner." Id. at 492 (emphasis added).[3]

In reversing the defendant's conviction in the Vignera v. New York case, the Court said, "Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present. . . ." 384 U.S. at 494 (emphasis added). At the trial the defense had attempted to question the police officer concerning whether Vignera had been informed of his right to counsel prior to interrogation. The trial judge sustained the State's objection to the question, thus precluding the defense from showing that the proper warnings had not been given. See id. at 493. In addition, the verbatim transcription of the questioning of the defendant did not demonstrate that warnings had been given.

The third case in the Miranda grouping, Westover v. United States, involved a situation where the Kansas City police questioned the defendant for a number of hours. See 384 U.S. at 494-95. There was no indication that the local police had given the defendant any Fifth Amendment warnings. See id. at 495. After the police concluded

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[3] One of the police officers involved in the Miranda case testified at trial that he did not tell the defendant that anything he said could be used against him or that he had the right to consult with a lawyer. See 384 U.S. at 492 n.66.

their interrogation, Westover was immediately turned over to the FBI for questioning. See id. The questioning took place at the same police station where the local police had questioned the defendant. See id. At trial one of the FBI agents testified that the defendant was told he did not have to make a statement, any statement made could be used against him, and he had the right to see an attorney. See id. The Supreme Court reversed the conviction despite the testimony of the agent and in doing so the Court said, "There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation." RI. at 496. In the final Miranda case, California v. Stewart, the Supreme Court affirmed the California Supreme Court's determination that the defendant's confession should have been suppressed because the record did not state whether the defendant had been advised of his right to remain silent or his right to counsel. See id. at 497-98.

While the four cases that were the subject of the Miranda decision did not present the type of factual scenario or the exact question we address today, some state and federal courts have addressed the exact issue of whether a suspect must be informed of the right to the presence of counsel during questioning with differing results. The principles espoused in the Miranda decision formed the basis of how these courts have treated the warnings.

A. Federal Courts

The federal courts are split regarding the necessity for express warnings of the right to have counsel present during interrogation. Several of the federal circuits have held that a suspect is entitled to be expressly informed of the right to have counsel present during questioning. In United States v. Tillman, 963 F.2d 137 (6th Cir. 1992), the defendant was informed: "[You have] the right to remain silent, the right to the presence of an attorney if [you] so wish, [you] are not required to answer any questions and if [you] decide to answer questions [you] can stop and do so. . . ." Id. at 140. The defendant argued that the Miranda warnings read to him were inadequate because he was never told that any statements he might make could be used against him, and that he was not informed he was entitled to an attorney during questioning in addition to before questioning. Tiliman, 963 F.2d at 140. The Sixth Circuit agreed and held that the statements made by the defendant subsequent to his arrest should be suppressed. See id. at 142. The court found a Miranda violation because the police failed to inform the defendant that he had the right to an attorney before, during, and after questioning. See Tiliman, 963 F.2d at 141.

Additionally, in Montoya v. United States, 392 F.2d 731(5th Cir. 1968), the Fifth Circuit found the warnings insufficient, Id. at 732. The customs agent testified that he informed the defendant as follows:

> [S]he had the right to remain silent, that anything she might say could be

> used against her if she was tried. [S]he had a right to an attorney, and, if she could not afford an attorney, one would be provided for her. [S]he could terminate the interview at any time she so desired.

Id. at 733. The court held that the defendant's confession was fatally defective under Miranda because "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Montoya, 392 F.2d at 734 (quoting Miranda, 384 U.S. at 471). The court reasoned that this warning is an absolute prerequisite to interrogation. See id. at 735; see also United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984) (holding that the right of the accused to be told that he can have counsel present during questioning is meaningful and mandated by the United States Constitution); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968) (noting that merely telling an individual that he could speak with an attorney before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation).

In contrast, several other circuits have found warnings adequate that did not expressly inform the defendant of the right to have counsel present during questioning. For example, in United States v. Frankson, 83 F.3d 79 (4th Cir. 1996), the defendant was informed: "[Y]ou have the right to an attorney." Id. at 81. The officer told the defendant that "while

he was talking to [the officer], he was free to stop talking to [the officer] at any time." Id. Frankson contended that the officer's warning failed to satisfy Miranda because it did not convey that he had the right to talk with counsel prior to the interrogation or the right to have counsel present during the interrogation. See Frankson, 83 F.3d at 81. The court held that the defendant's Miranda warnings were not erroneous because the warnings "communicated to [the defendant] that his right to an attorney began immediately and continued forward in time without qualification." Frankson, 83 F.3d at 82.

More recent, in Bridgers v. Dretke, 431 F.3d 853 (5th Cir. 2005), cert. denied, 548 U.S. 909 (2006), the defendant was informed of his right to the presence of an attorney prior to any questioning. See id. at 856. Bridgers contended that the warnings he received were inadequate under Miranda because the warnings did not also explicitly state that he had a right to consult an attorney during questioning. See Dretke, 431 F.3d at 857. The court found the state appellate court's decision upholding the warning was adequate because it was a reasonable application of clearly established federal law. See id. at 858-60.[4]

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[4] Under similar circumstances other federal circuits have held the warnings adequate. See, eg., United States v. Caldwell, 954 F.2d 496, 504 (8th Cir. 1992) (noting that the general warning could not have misled the defendant into believing that an attorney could not be present during questioning); United States v. Anthon, 648 F.2d 669, 674 (10th Cir. 1981) (holding that the warnings were adequate even though defendant "was not advised of the right to have counsel present during

B. Florida Courts

After our holding in Traylor, we reiterated the principles espoused in Traylor and the Miranda decision in several other decisions from this Court. In both Ramirez v. State, 739 So. 2d 568 (Fla. 1999), and Sapp v. State, 690 So. 2d 581 (Fla. 1997), neither of which presented the exact issue involved in the case that is presently before us, we noted the requirements of both the Fifth Amendment, as explained in Miranda, and the Florida Constitution, as explained in Traylor. Our explanation of the federal and state requirements included the requirement that a suspect be informed of the right to have counsel present during questioning. See Ramirez, 739 So. 2d at 573 (quoting from Miranda that suspects must be informed that they have a right to an attorney during questioning); Sapp, 690 So. 2d at 583-84 (citing to Miranda for the proposition that an individual has the right to have counsel present during custodial interrogation).

More recently, the issue of whether Miranda requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation has been addressed by several of the Florida district courts of appeal. In addition to the Powell case, the Second District addressed this issue in M.A.B. v. State, *957* So. 2d 1219 (Fla. 2d DCA

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questioning and the right to stop the questioning at any time"); United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973) (holding that the Miranda warnings were satisfactory even though the warnings did not inform the suspect specifically of his right to have an attorney present during questioning).

2007) (en banc); Mitchell v. State, 32 Fla. L. Weekly D2958 (Fla. 2d DCA Dec. 14, 2007), notice invoking discretionary jurisdiction filed, No. SCO7-2429 (Fla. Dec. 28, 2007); and Seward v. State, 973 So. 2d *578* (Fla. 2d DCA 2008). As in this case, the defendants in these three cases argued that the Miranda warnings given to them were inadequate because the warnings did not specifically inform them of the right to have counsel present during police questioning. In M.A.B., considering the case en banc, the Second District was evenly divided seven-to-seven; thus, a majority of the court did not reach a decision on the adequacy of the Miranda warnings.[5]

Subsequent to M.A.B., the Second District decided Powell and applied Powell when it decided in Mitchell and Seward that the Miranda warnings were deficient because the warnings did not specifically inform the defendants of their right to have counsel present during questioning. Later, however, in Graham v. State, 974 So. 2d 440 (Fla. 2d DCA 2007), the Second District distinguished Powell because the police in Graham advised the defendant that he had the right to the presence of an attorney and did not include any timeframe limitation. See Graham, 974 So. 2d at 440.

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[5] Judge Canady's concurring opinion sets forth some case law from other courts that address this issue and that are consistent with the court's ultimate affirmance of the trial court's denial of the motion to suppress. See United States v. Vanterpool, 394 F.2d 697, 699 (2d Cir. 1968); United States v. Anderson, 394 F.2d 743, 746-47 (2d Cir. 1968); State v. Arnold, 496 P.2d 919, 922-23 (Or. Ct. App. 1972).

In multiple cases the Fourth District Court of Appeal has addressed the issue of whether an individual must be expressly informed of his right to the presence of counsel during custodial interrogation. In Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), the police advised the defendant: "*You* have the right to talk with a lawyer and have a lawyer present before any questioning. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish." at 1226. The defendant contended that he did not knowingly and intelligently waive his constitutional rights under Miranda because the Miranda warning he received failed to inform him that he had a right to have an attorney present during questioning. See Roberts, 874 So. 2d at 1226. The district court agreed and reversed his conviction. See id.[6] The court

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[6] The Fourth District held similarly in Martin v. State, 921 So. 2d 697 (Fla. 4th DCA 2006) (holding warning constitutionally defective because it did not advise the defendant of the right to counsel during questioning); Ripley v. State, 898 So. 2d 1078 (Fla. 4th DCA 2005) (finding at that time Broward County Sheriff's Office standard warnings defective because warnings did not advise of right to have counsel present during questioning); Bross v. State, 898 So. 2d 1027 (Fla. 4th DCA 2005) (reversing conviction because Miranda warnings did not inform the defendant of the right to have counsel present during questioning); Cook v. State, 896 So. 2d 885 (Fla. 4th DCA 2005) (warning that advises the defendant of the right to talk to an attorney and have an attorney present before any questioning did not advise defendant of the right to have counsel present during questioning); Dendy v. State, 896 So. 2d 800 (Fla. 4th DCA 2005) (finding at that time Broward County Sheriff's Office standard warnings did not advise the defendant of the right to have counsel present during questioning).

reasoned that nowhere does the Miranda form advise the defendant of his right to have a lawyer present during questioning. See Roberts, 874 So. 2d at 1226. The use of the "before questioning" warning alone suggests that the suspect was misled into believing that the attorney could not be present during questioning itself. See id. at 1228 (citing Caldwell, 954 F.2d at 504). Moreover, the court rejected the State's argument that the defendant understood his rights because he also signed a "waiver of rights" Miranda form. See Roberts, 874 So. 2d at 1229.[7]

Thereafter, the court, in Franklin v. State, 876 So. 2d 607 (Fla. 4th DCA 2004), and West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004), relied on Roberts and reversed the convictions where the same deficient warnings were given. The defendant in Franklin presented to the trial court ninety forms used by both state and federal law enforcement agencies. Eighty-nine of the forms advised the defendant that he or she could consult with an attorney during questioning. Only the form that was used in Franklin's case did not contain that advice. Additionally, in support of its finding that the omitted warning was critical, the court cited language from Duckworth v. Eagan, 492 U.S. 195 (1989), indicating that Miranda does not require law enforcement to produce attorneys as if on call, but Miranda does require that a suspect be informed

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[7] The court, after finding the motion to suppress should have been granted, engaged in a harmless error analysis and found the error was not harmless beyond a reasonable doubt.

that he has the right to an attorney before and during questioning. See Franklin, 876 So. 2d at 608.[8]

The Fifth District also addressed a similar issue in Maxwell v. State, 917 So. 2d 404 (Fla. 5th DCA 2006), and Octave v. State, 925 So. 2d 1128 (Fla. 5th DCA 2006). In Maxwell, the police officer failed to advise the defendant that "he had a right to have an attorney present during questioning and that an attorney would be appointed to represent him if he could not afford one." 917 So. 2d at 406. Accordingly, the district court held that the trial court erred in failing to grant the motion to suppress. The district court noted:

> We do not believe that even the most erudite or mature individual could reasonably discern with the level of understanding required by Miranda that the warning given to Jonathan - that he "had the right to an attorney"- encompasses the right to have an attorney present during questioning and the right to have one appointed in the event the individual could not afford to hire one. Failure to provide these warnings to Jonathan renders the statements he made inadmissible.

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[8] We note that the Fourth District in Canete v. State, 921 So. 2d 687 (Fla. 4th DCA 2006) (en banc), distinguished the warnings given in that case from the warnings given in Roberts by opining that the defendant was not misled by the warnings.

See id. at 409. Similarly, in Octave, the police only explained to the defendant that she had a right to counsel. See 925 So. 2d at 1129. Citing Maxwell, the court reversed the trial court's denial of the motion to suppress, finding the warnings given did not apprise the defendant of her right to have a lawyer present during questioning.[9]

3. Warnings Given to Powell

The Miranda warnings given to Powell were:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any

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[9] Recently, in State v. Modeste, 987 So. 2d 787 (Fla. 5th DCA 2008) (en banc), the Fifth District receded from its previous holding in Maxwell and Octave. See Modeste, 987 So. 2d at 790. Specifically, the court receded from its previous holding that a Miranda warning is inadequate when the suspect is not expressly advised that the right to counsel includes the right to have counsel present during custodial interrogation. Modeste, 987 So. 2d at 790. The Fifth District concluded that while the language in Miranda might indicate that a suspect must be expressly advised of the right to have counsel present during questioning, a close reading of Miranda strongly suggests a contrary conclusion. See Modeste, 987 So. 2d at 790 (citing M.A.B v. State, 957 So. 2d 1219, 1222-27 (Fla. 2d DCA 2007) (Canady, J., concurring), review granted, 962 So. 2d 337 (Fla. 2007)).

> questioning. You have the right to use any of these rights at any time you want during this interview.

Powell, 969 So. 2d at 1064 (emphasis added). The inquiry is whether the failure to clearly inform the defendant of the right to the presence of counsel during custodial interrogation violates the principles espoused in Miranda. The warnings given must be sufficient to convey the rights to a person of ordinary intelligence and common understanding. See Missouri v. Seibert, 542 U.S. 600, 615-16 (2004) (noting that a reasonable person in the suspect's shoes could have seen the questioning as a new and distinct experience). The State contends that the totality of the Miranda warnings read to Powell touched the bases required by Miranda and did not deprive him of any information essential to his ability to knowingly waive his privilege against self-incrimination. In contrast, Powell contends that the warnings place a limit on an unlimited right to consult counsel before, during, and after interrogation. We hold that Powell was not clearly informed of his right to have counsel present during questioning.

Under article I, section 9 of the Florida Constitution, as interpreted in Traylor v. State, a defendant has a right to lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. Accord Ramirez, 739 So. 2d at 573 (finding suspects must be informed that they have a right to an attorney during questioning); Sapp, 690

So. 2d at 583-84 (same). The standard police department Miranda form used during the interrogation of Powell did not expressly indicate that he had the right to have an attorney present during questioning. Powell was told he had the right to talk with a lawyer before questioning and that he could use that right at any time during the interview. The right he could use during the interview was the right he was told he had - to talk with a lawyer before answering questions. This is not the functional equivalent of having the lawyer present with you during questioning. As stated in Miranda, "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." Thus, "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." Miranda, 384 U.S. at 469-70.

The State contends that since the Miranda decision, the United States Supreme Court has held that Miranda did not require of or impose upon law enforcement a rigid and precise formulation of the warnings to be given to a criminal defendant. In Anderson, we also noted that "there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, as long as the warnings are not misleading." 863 So. 2d at 182 (emphasis added). In this case the warning was misleading. The warning said "before answering any questions." The "before questioning" warning suggests to a reasonable person in the suspect's

shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

The State further contends that the final warning, "You have the right to use any of these rights at any time you want during this interview," reasonably informed Powell of the right to have an attorney present during the interrogation. The Second District disagreed and found that language could not cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation. See Powell, 969 So. 2d at 1067. We agree with the Second District and hold that Powell should have been clearly informed of his right the presence of counsel during the custodial interrogation. The catch-all language did not effectively convey to Powell his right to the presence of counsel before and during police questioning. This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

Lastly the State argues that Powell had actual knowledge of his rights based on his prior dealings with law enforcement. However, in Miranda the Court disapproved of a case-by-case inquiry into

whether or not a suspect was aware of the unarticulated right. The Court said:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

384 U.S. at 468-69 (footnote omitted). Powell's prior dealings with law enforcement cannot substitute for adequate Miranda warnings.

4. Harmless Error

Because the erroneous admission of statements obtained in violation of Miranda is

subject to harmless error analysis, we next consider whether the error in this case was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967); Caso v. State, 524 So. 2d 422, 425-26 (Fla. 1988). In order to find the error harmless, we must find that beyond a reasonable doubt the admission of the confession did not affect the jury's verdict. See Thompson v. State, 595 So. 2d 16, 18 (Fla. 1992) (citing Caso, 524 So. 2d at 425-26); State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)).

The evidence, absent the statement, tending to connect Powell to this crime consists of the following: (1) Powell was one of at least four adults present in the apartment where the handgun was found, and (2) Powell was in the upstairs hallway coming from near the southeast corner bedroom where the loaded nine- millimeter handgun was found under a bed. The firearm was not found on Powell or within close proximity to him. There was no forensic evidence introduced about the gun or any testimony elicited from witnesses that would place the firearm in Powell's possession. Therefore, with the exception of Powell's unwarned statements, the evidence does not establish that Powell committed the crime of possession of a firearm. Therefore, we find the error is not harmless beyond a reasonable doubt.

Our decision today is not to be applied retroactively to cases that are already final on the date of this opinion. The decision made today is not new law and is not entitled to retroactive application.

CONCLUSION

Because Powell was not clearly informed of his right to the presence of counsel during the custodial interrogation, we agree with the Second District and answer the certified question in the affirmative. Thus, we also agree with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by Miranda. Both Miranda and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. Based on this conclusion, we approve the Second District's decision in Powell to the extent the decision is consistent with this opinion.

It is so ordered.

ANSTEAD, PARIENTE, LEWIS, and BELL, JJ., concur. PARIENTE, J., concurs with an opinion, in which ANSTEAD and LEWIS, JJ., concur.

WELLS, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

Justice Wells expressed concerns in his dissent that our decision will "unduly and unnecessarily

burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel." The answer to these concerns is straightforward. Indeed, in this case, it is difficult to understand how informing Powell that he had a right to an attorney both before and during questioning would have impeded the investigation of the officers questioning Powell.[10]

I have every *faith* that law enforcement agencies have the ability to administer Miranda warnings that accurately reflect the law, and most of the agencies throughout the State already have adequate warnings. The widespread use of Miranda warnings that fully inform a person of his or her right to an attorney during questioning demonstrates that this Court's decision to mandate such a warning does not "unnecessarily burden" the proper investigation of crimes, but is a minimal obligation on the part of law enforcement that ensures that the purposes of Miranda and the Fifth Amendment rights protected by Miranda are

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[10] A proper Miranda warning in this case could have been as simple as the following

> You have the right to talk to a lawyer before answering any of our questions **and at any time during questioning.** If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

(Additions in bold.)

fulfilled. As for those law enforcement agencies that create new versions of the warning that might misstate the law, I would urge that the Attorney General or some other statewide law enforcement organization work to create standard Miranda forms for use by police departments throughout the state that will withstand legal scrutiny.

Also, Justice Wells concludes that the Court's holding "is at most an extreme technical adherence to language and ... has no connection with whether the person who confessed understood his or her rights." However, the adequacy of the language in a Miranda warning is directly related to an accused's awareness of his or her rights, and necessarily, his or her ability to fully understand them. In Miranda, the Supreme Court held "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation," and "[o]nly through such a warning is there ascertainable assurance that the accused was aware of this right." 384 U.S. at 471-72.

Many outside the judiciary might call the requirements of the Constitution, especially the Fourth and Fifth Amendments, merely "technical." But the rights guaranteed in the Bill of Rights were deemed necessary at the founding of this country to ensure the rights of all individuals. Because Fourth and Fifth Amendment issues are most often raised by a defendant in a criminal proceeding, these opinions are never "popular." However, all of us in the justice system must be ever vigilant to never

sacrifice the basic values in the Constitution for the sake of expediency; otherwise, we run the risk of slowly but surely eroding the very principles that have been the foundation of this democracy. As Justice Lewis expressed in a recent opinion from this Court:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient, or when expediency dictates otherwise, is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our government.

Baptiste v. State, 33 Fla. L. Weekly S662, S668 (Fla. Sept. 18, 2008) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957)). For all these reasons, I fully concur in the majority opinion.

ANSTEAD and LEWIS, JJ., concur.

WELLS, J., dissenting.

I dissent from the decision of the majority. I would quash the decision of the Second District Court of Appeal in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), and adopt the view of the seven members of the Second District in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007), who would hold

that the warnings given in these cases adequately advise defendants of their Miranda[11] rights.

I believe that the majority stretches the plain language of the warning given in this case and ignores the simple, straight-forward requirements for a warning set out in Miranda. The majority needlessly complicates the Miranda warning requirements to reach its conclusion that the warning read to Powell was inadequate.

The consent form used in this case specifically and plainly advised, "You have the right to talk to a lawyer before answering any of our questions." (Emphasis added.) I agree with the majority that the sufficiency of Miranda warnings must be reviewed from the perspective of "a person of ordinary intelligence and common understanding." Majority op. at 18 (citing Missouri v. Seibert, 542 U.S. 600, 615-14 (2004) ("[S]ince a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.")). However, contrary to the majority, I find that it is patently unreasonable to construe the statement at issue as conveying a meaning other than: you can talk to a lawyer before answering any of law enforcement's questions. To hold this warning inadequate under Miranda is to give only lip service to the United State Supreme Court's repeated statement that the relevant

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[11] Miranda v. Arizona, 384 U.S. 436 (1966).

"inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda." Duckworth v. Eagan, 492 U.S. 195, 203 (1981) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)). The warning in this case stated that a suspect has a right to talk to an attorney before answering any question. I would find that the use of the phrase "any of our questions" was sufficient to "reasonably convey" to a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation. It is unreasonable to conclude that the broad, unqualified language read to Powell would lead a person of ordinary intelligence to believe that he or she had a limited right to consult with an attorney that could only be exercised before answering the first question posed by law enforcement.

In addition, I agree with the plurality from M.A.B. that the final sentence of the warnings used in these cases ensures that the Miranda warning "avoids the implication—unreasonable as it may be · that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." M.A.B., 957 So. 2d at 1227. This final sentence informs suspects, "You have the right to use any of these rights at any time you want during this interview." The previously listed rights consist of the right to remain silent, the right to talk to a lawyer before answering any questions, and the right to have an attorney appointed without cost before any questioning. Again, I find that it is patently unreasonable to conclude that a person of ordinary

intelligence would interpret this invitation to use "any of these rights at any time you want during this interview" (emphasis added) to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement. The totality of the warning reasonably conveyed to Powell his continuing right of access to counsel.

Finally, I do not join the majority's decision because it expands upon the Miranda warning criteria set by the Supreme Court, resulting in an extreme, unworkable application of the Miranda decision. This needless complication is contrary to the spirit of the Supreme Court's decision, in which it stated that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." 384 U.S. at 481. The majority's decision to require overly detailed Miranda warnings will unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel. Additionally, it will result in reversing the convictions of individuals who have confessed to crimes based upon a holding that is at most an extreme technical adherence to language and that has no connection with whether the person who confessed understood his or her rights.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 2D05-646

(Hillsborough County)

Bill McCollum, Attorney General, Tallahassee, Florida, and Robert J. Krauss, Senior Assistant Attorney General, Bureau Chief, and Susan M. Shanahan, Assistant Attorney General, Tampa, Florida,

for Petitioner

James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Respondent

OPPOSITION BRIEF

Case No. 08-1175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2008

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN DEWAYNE POWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION, CONFLICTS WITH *MIRANDA V. ARIZONA* AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

II

AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as *State v. Powell*, 998 So.2d 531 (Fla. 2008), and is found in the appendix at A1-A31. The opinion of the Second District Court of Appeal is reported as *Powell v. State*, 969 So.2d 1060 (Fla. Dist. Ct. App. 2007), and is found in the appendix at B1-B14.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 9 of the Florida Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The following are additional facts along with corrections to Petitioner's Statement of the Case:

At trial, after the court ruled that Respondent's confession was admissible, Respondent testified that the police showed him the firearm after he arrived at the police station. (Vol. 2/T149) Before the police told him about the gun, he did not know that it was underneath Ms. West's bed in the apartment. (Vol. 2/T149) Mr. Powell admitted that he told the police he owned the gun. He told them he bought it "off the street" for $150, and he used it for protection. However, he explained that the police threatened to charge his girlfriend and take away her children. (Vol. 2/T151-52) The police also threatened to have her evicted from the housing project. (Vol. 2/T152, 153) Ms. West had three children ages 3, 11 and 12. (Vol. 2/T155) In rebuttal, Detective Estevez then denied the police threatened Mr. Powell. (Vol. 2/T165-66)

Before Mr. Powell explained why he gave a false confession, counsel asked the following questions:

> MS. CHERRY: Um, I want you to take a look at this form, Mr. Powell. This is the form that detective Estevez read to you, correct?
>
> MR. POWELL: Yes.
>
> MS. CHERRY: And the way the language is on there I want you to take a look at it. Does that look like the form that you signed?
>
> MR. POWELL: Yes.

MS. CHERRY: To be interviewed and look at the bottom is that your signature, sir?

MR. POWELL: Yes.

MS. CHERRY: so, you're telling the jury that you did in fact sign this waiver of your rights?

MR. POWELL: Yes.

MS. CHERRY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?

MR. POWELL: Yes.

MS. CHERRY: You waived your right to remain silent and not make any statements that could be used against you in a court of law like they're being used against you today, right, that's what this form is, right?

MR. POWELL: Yes.

MS. CHERRY: And when you signed this form you did in fact make some statements?

MR. POWELL: Yes.

MS. CHERRY: And in fact you made the statements that Detective Augeri and Detective Estevez said that you made, didn't you?

MR. POWELL: Yes.

MS. CHERRY: Now, explain to the jury why -- and first of all were those statements that you made on that night to Detective Augeri and Detective Estevez were those statements true?

MR. POWELL: No.

(Vol. 2/T150-151)

In the decision in the Second District Court of Appeal in Respondent's initial appeal, *Powell v. State*, 969 So.2d 1060 (Fla. Dist. Ct. App 2007) (Appendix B1-B14), the court commented on a corpus delicti defect that Respondent's trial counsel failed to raise. In footnote number 7, the court wrote:

> Although it was not argued in the trial court, a possible corpus delicti issue exists. In order to introduce Mr. Powell's confession, the State was required to prove that Mr. Powell constructively possessed the weapon. The general order of proof is to show that a crime has been committed and then that the defendant committed it. *Spanish v. State*, 45 So. 2d 753, 754 (Fla. 1950); *see State v. Allen*, 335 So. 2d 823, 825-825 (Fla. 1976). A defendant's confession or statement "may be considered in connection with other evidence" but corpus delicti cannot rest upon the confession or admission alone. *Cross v. State*, 119 So. 2d 380, 384 (Fla. 1928). Before a confession or statement may be admitted there must be prima facie proof tending to show the crime was committed. *Farinas v. State*, 569 So. 2d 425 (Fla. 1990); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984); *Frazier v. State*, 107 So. 2d 16, 26 (Fla. 1958). In the present case, although Mr. Powell stipulated he was a convicted felon, there was no independent proof that he possessed a firearm. There were several other adults in the apartment at the time of Mr. Powell's arrest. The State did not introduce forensic evidence from the gun or elicit any testimony that would place the firearm in Mr. Powell's possession. Simply put, there was no evidence other than the unwarned statements Mr. Powell made to establish that a crime had been committed.

Powell, 969 So.2d at 1064 n.7; (Appendix Pages B6-7).

The Florida Supreme Court reviewed the decision of the Court

of Appeal and held that Powell was not "clearly informed" of his right to have counsel present during questioning as required by the Florida Constitution and *Miranda*. *See State v. Powell*, 998 So.2d 531, 540 (Fla. 2008). The court's holding does not require that a suspect be "expressly" advised of his right to counsel during questioning, it merely requires that the "functional equivalent" of the warnings be conveyed. *Id.* at 540-41.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION, CONFLICTS WITH *MIRANDA v. ARIZONA* AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

A. The opinion of the Florida Supreme Court in *Powell* is founded on independent and adequate State Constitutional grounds and Florida case law interpreting Article I, §9 of the Florida Constitution.

The opinion in *Powell* plainly states that the Florida Supreme Court based its decision on the independent requirements of the Self-Incrimination Clause of article 1, §9 of the Florida Constitution,[1] separately and apart from precedent from this Court interpreting the constraints of the Fifth Amendment. The opinion is also clear that the court's decision under the Florida Constitution would be adequate to resolve the issue.

The *Powell* opinion makes repeated references to *Traylor v. State*, 596 So.2d 957 (Fla. 1992). *See Powell*, 998 So.2d at 534, 535, 535 n.2, 537-538, 540. In *Traylor*, the Florida Supreme Court made it clear that, pursuant to "federalist principles," the court was free to "place more vigorous restraints on government

[1] Article I, section 9 of the Florida Constitution provides in pertinent part that "[n]o person shall be . . . compelled in any criminal matter to be a witness against himself."

intrusion than the federal charter imposes." *Traylor*, 596 So.2d at 961, citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). The court asserted, "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." *Id.* at 962 (citation omitted). In light of that realization, the *Traylor* court construed the Self-Incrimination Clause of article I, §9, of the Florida Constitution to require that certain rights be conveyed to suspects in custodial interrogation, and the court defined those rights to include the "right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Traylor* at 965-966, 966 n.13.

In a footnote, the *Traylor* court observed that in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court "established procedural safeguards **similar** to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation." *Traylor*, 596 So.2d at 965 n. 12 (emphasis added). Therefore, by defining *Miranda* rights as "similar to" those mandated by its decisions, the Florida Supreme Court establish that its mandatory warnings under state law were independent from those required by *Miranda*. And, unlike this Court, the Florida Supreme Court created a "bright-line" standard for purposes of state law, writing:

> A prime purpose of the above safeguards is to maintain bright-line standard for police

> interrogation; any statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the State.

Traylor at 966.

In *Powell*, the supreme court's shorthand references to *Traylor* and its references to article I, §9 of the Florida Declaration of Rights clearly demonstrate that its holding was grounded in the Self-Incrimination Clause of the Florida Constitution, but that the holding was not inconsistent with *Miranda*. For example, after explaining the rights outlined in *Miranda*, the *Powell* court wrote:

> Similarly, to ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution, this Court in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), outlined the following rights Florida suspects must be told of prior to custodial interrogation:
>
> > [1] they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help, and [4] that if they cannot pay for a lawyer one will be appointed to help him. *Id.* at 966 . . . .

Powell, 998 So. 2d at 534-535; (Appendix, Page A7). The court went on to explain that in *Traylor*, "we also unequivocally said that the help of an attorney includes both the right to consult with an attorney before questioning and the right to have an attorney present during questioning." *Powell* at 535, quoting *Traylor* at 966 n. 13.

The court also wrote:

> After our holding in *Traylor*, we reiterated the principles espoused in *Traylor* and the *Miranda* decision in several other decisions from this Court. In both *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), and *Sapp v. State*, 690 So. 2d 581 (Fla. 1997), neither of which presented the exact issue involved in the case that is presently before us, we noted the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylor*. Our explanation of the federal and the state requirements included the requirement that a suspect be informed of the right to have counsel present during questioning. *See Ramirez*, 739 So. 2d 573 (quoting from *Miranda* that suspects must be informed that they have a right to an attorney during questioning); *Sapp*, 690 So. 2d at 583-84 (citing to *Miranda* for the proposition that an individual has the right to have counsel present during custodial interrogation).

Powell, 998 So. 2d at 537-38; (Appendix, Pages A13-14). In the opinion, the court reiterated: "Under Article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to a lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Powell*, 998 So.2d at 540; (Appendix, Page 19).

In its conclusion, the Florida Supreme Court declared:

> Because Powell was not clearly informed of his right to the presence of counsel during the custodial interrogation, we agree with the Second District and answer the certified question in the affirmative. Thus, we also agree with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional

> warning than that required by *Miranda*. Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning . . .

Powell, 998 So. 2d at 542; (Appendix, Pages A23-24).

Rigterink v. State, 2 So.3d 221 (Fla. 2009), the only other case discussing this issue from the Florida Supreme Court, is also pending in this Court on petition for writ of certiorari as Case No. 08-1229. In *Rigterink* the court held that, under its decision in *Powell*, the confession had to be suppressed. The court again asserted that, as the ultimate arbiter of the meaning and extent of the safeguards provided under the Florida Constitution, it had decided to interpret Florida's right against self-incrimination more broadly than that right under the Fifth Amendment:

> . . . [U]nlike article I, sections 12 ("Searches and seizures") and 17 ("Excessive punishments"), section 9 does *not* contain a proviso that we must follow federal precedent with regard to the right against self-incrimination. *Cf. Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992)("When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein.").
>
> Thus, in this context, the federal Constitution sets the floor, and not the ceiling, and this Court retains the ability to interpret the right against self incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart. *See, e.g., In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989)("State constitutions, too, are a font of individual liberties, their protections often extending

> beyond those required by the Supreme Court's interpretation of federal law . . . [W]ithout [independent state law], the full realization of our liberties cannot be guaranteed." (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977))). This Court is the ultimate "arbiter [] of the meaning and extent of the safeguards provided under Florida's Constitution." *Busby v. State*, 894 So.2d 88, 102 (Fla. 2004).

Rigterink, 2 So.3d at 241.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U. S. 722, 729 (1991). In *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185 (1995), the Court recognized that state courts are "absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." In deciding the jurisdictional question, the *Evans* Court wrote:

> In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1202 (1983), we adopted a standard for determining whether a state-court decision rested upon an adequate and independent state ground. When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that the federal law required it to do so." *Id.*,

at 1040-1041, 115 S.Ct. at 3476.

Evans, 514 U.S. at 7, 115 S.Ct. at 1189.

That being said, a look at treatment of state law in the state courts opinions in both *Evans* and *Long* shows that those decisions are unlike the analysis of Florida law in this case. In *Long*, the lower court mentioned the Michigan Constitution only twice in passing. In *Evans*, the Arizona Supreme Court suppressed evidence found after Evans was arrested as a result of an inaccurate computer record showing an outstanding warrant. Evans argued that this Court lacked jurisdiction under 28 U.S.C. §1257 because the Arizona Supreme Court based its decision on a state "good-faith" statute. This Court rejected that argument, and a reading of the Arizona Supreme Court opinion clearly shows that the state court found the good-faith statute of no use in its analysis because the motivation of the police was not at issue. *See State v. Evans*, 866 P.2d 869, 871 (Ariz. 1994).

In the *Powell* opinion, and later, in the discussion of *Powell* in *Rigterink*, the Florida Supreme Court laid out a detailed analysis of its previous interpretation of the Florida Self-Incrimination Clause in *Traylor*. The court explained that it had exercised its prerogative to accord broader protection under the Florida Declaration of Rights than under the United States Constitution. The court also made it clear that although *Miranda*, and the cases from this Court that followed, were a guide in

assessing the prohibition against compelled testimony in Florida, the result was in no way compelled by federal law. Since the result would remain valid independent of further input from this Court, the decision is founded on the adequate and independent state ground of the Florida Constitution, and any decision of this Court would be an advisory opinion. *See Coleman v. Thompson*, 501 U. S. at 729 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

B. The opinion in *Powell* is in harmony with this Court's decisions in *Miranda*, *California v. Prysock*, 453 U. S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), because the Florida Supreme Court merely applied this Court's precedent to the unique facts in this case and concluded that the warnings, as a whole, failed to convey an essential element required by *Miranda*.

Even if the opinion below were not grounded on independent and adequate State grounds, the opinion of the Florida Supreme Court neither conflicts with *Miranda* nor expands *Miranda*. The court merely determined whether or not specific warnings read to Respondent failed to convey the *Miranda* requirement that a suspect be generally informed of his right to the presence of counsel during interrogation. The court concluded that, when read as a whole, the warnings in this case were misleading and inadequate.

Rule 10 of the Supreme Court Rules provides that a petition for writ of certiorari will be granted only for "compelling reasons." Under this rule, those reasons include "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." This case does not present a new question of federal law or a conflict with this Court's decisions.

The "question presented" as laid out by Petitioner states that the Florida Supreme Court's holding requires that a suspect must be "expressly advised" of his right to counsel during custodial interrogation. This statement is not correct. Although the lower appellate court presented the issue to the Florida Supreme Court in that form, the court ultimately held only that a suspect has to be "clearly informed" of his right to counsel during interrogation. *Powell*, 998 So.2d at 540 ("We hold that Powell was not clearly informed of his right to have counsel present during questioning."). The *Powell* holding merely requires a warning which, when read in whole, imparts the essential requirements of *Miranda*, either in the form proscribed by this Court or the "functional equivalent" of that form. The opinion does not require any specific language, and references to the language contained in *Miranda* are used merely as a concise

statement of the right to counsel involved.

Thirteen years after *Miranda*, in *Fare v. Michael C.*, 442 U.S. 707, 716, 99 S.Ct. 2560, 2568 (1979), this Court reaffirmed the essential components of *Miranda* warnings:

> The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his ***right to have counsel, retained or appointed, present during interrogation***.

Id., citing *Miranda*, 384 U.S. at 473, 86 S.Ct. at 1627. (Emphasis added). In *Miranda*, this Court stated unequivocally:

> Accordingly, we hold that an individual held for interrogation must be ***clearly informed*** that he has the right to consult with a lawyer ***and to have the lawyer with him during interrogation*** under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

384 U.S. at 471-72 (emphasis added). The *Powell* holding mirrors that language.

The *Powell* court carefully considered the *Miranda* holding above, along with the rationale provided by this Court, before determining that the warnings read to Respondent were not the

functional equivalent of the warnings required by *Miranda*. Foremost in consideration was this Court's reasoning:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, ***the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege*** under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process . . . . Thus, ***the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning*** if the defendant so desires.

Powell at 534 (citing *Miranda* at 384 U.S. 469-90 and adding emphasis).

The warning form read to Respondent Powell, which was found not to contain the essence of *Miranda* warnings, stated:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. **You have the right to talk to a lawyer before answering any of our questions**. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell, 998 So.2d at 532 (emphasis added). The Florida Supreme Court merely applied this Court's precedent to the facts before it and concluded:

> Because Powell was not clearly informed of

> his right to the presence of counsel during the custodial interrogation, we agree with the Second District and answer the certified question in the affirmative. Thus, we also agree with the Second District that ***to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by Miranda***. Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning . . .

Powell, 998 So.2d at 542 (emphasis added); (Appendix, Pages A23-A24).

In its careful analysis in *Powell*, the Florida Supreme Court fully appreciated that "*Miranda* does not mandate the warnings be a virtual incantation of the precise language contained in the *Miranda* opinion." *Powell* at 534, citing *California v. Prysock*, 453 U. S. 355, 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). The *Powell* court also noted,

> Moreover, in *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), the Supreme Court further said that "[r]eviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Id.* at 203, 109 S.Ct. 2875 (quoting *Prysock*, 453 U.S. at 361, 101 S.Ct. 2806).

Powell at 534.

The Florida Supreme Court simply concluded, consistent with both *Prysock* and *Duckworth*, that the warning to Powell that he

had the right "to talk with a lawyer before answering any questions" was not the "functional equivalent" of "having the lawyer with you during questioning." *Powell* at 540. The court explained that it found "the warning was misleading," writing:

> The State contends that since the *Miranda* decision, the United States Supreme Court has held that *Miranda* did not require of or impose upon law enforcement a rigid and precise formulation of the warnings to be given to a criminal defendant. In *Anderson* [*v. State*, 863 So.2d 169 (Fla. 2003)], we also noted that "there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, ***as long as the warnings are not misleading***." 863 So.2d at 182 (emphasis added). In this case the warning was misleading. The warning said "***before*** answering any questions." The "before questioning" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning: there is nothing in that statement that suggests the attorney can be present during the actual questioning.

Powell at 541.

In *Prysock*, this Court observed "ordinarily this Court would not be inclined to review a case involving application of [] precedent to a particular set of facts." *Prysock*, 453 U.S. at 355, 101 S.Ct. at 2807 (citing *Fare v. Michael C.*, 439 U.S. 1310, 1314, 99 S.Ct. 3, 558 L.Ed.2d 19 (1978)(Rehnquist, J., in chambers)). Also, whether or not a lower court's decision is correct, Rule 10 of this Court provides: "A petition for a writ of certiorari is rarely granted when the asserted error consists

of erroneous factual findings or the misapplication of a properly stated rule of law." There is no doubt that the *Powell* court properly stated the applicable rules of law.

Nevertheless, the holding in this case conflicts neither with the spirit, nor the actual holding, of *Prysock*. In *Prysock*, the state court held that warnings were inadequate because the defendant was not specifically told he had the right to the services of a free attorney before and during interrogation. Specifically, Prysock was told: "You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning"; and later, "you have the right to have a lawyer appointed to represent you at no cost to yourself." *Prysock*, 453 U.S. at 357. This Court was concerned that the state court found the warnings invalid simply because of the order in which they were given. The Court believed the lower court "essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion." *Id.* at 355.

In arriving at its decision, this Court noted that during the interview, the defendant's mother asked if Prysock could still have an attorney at a later time if he gave a statement to the officer without one. The officer told the mother that Prysock would have an attorney when he went to court and that "he could

have one at this time if he wished one." This Court found the warnings were sufficient because "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed right to have a lawyer before he was questioned, while he was questioned and all during the questioning." *Id.* at 360-61.

In contrast, in *Powell*, the Florida Supreme Court found that the warnings were inadequate because they did not mention the presence of counsel at any time and limited the narrower right "to talk to" counsel to the time period "before answering any of our questions." This defect is distinguishable from that in *Prysock*, because the defect pertains to the substance of the warning as opposed to its form.

In *Duckworth*, the accused was specifically informed: "You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning;" and "You have this right to the advice and presence of a lawyer even if you cannot afford to hire one." *Duckworth*, 492 U.S. at 198. The issue in that case was whether the fact that police told him, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court," rendered the warnings defective. In rejecting a rigid form for *Miranda* warnings, this court stated: "*Miranda* does not require that attorneys be producible on call, but only that the suspect be

informed . . . that he has a right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth*, 492 U.S. at 204.

In *Duckworth*, the Court noted that the *Prysock* Court's disapproval was restricted to warnings that "would not apprise the accused of his right to have an attorney present if he chose to answer questions." *Id.* at 205. Therefore, *Prysock* and *Duckworth* seem to answer the question posed in *Powell*, and the holding in *Powell* is in accordance with these decisions.

Petitioner cites Justice Breyer's statement explaining the decision to deny certiorari in *Bridgers v. Texas*, 532 U.S. 1034, 121 S.Ct. 1995 (2001)(Breyer, J., dissenting with Stevens and Souter, J.J., joining). The *Miranda* warnings read to Bridgers stated, "You have the right to the presence of an attorney/lawyer prior to any questioning." *Id.* Justice Breyer expressed his colleagues' concerns, citing *Prysock* and writing, "Although this Court has declined to demand 'rigidity in the form of the required warnings,' [ ] the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element." *Bridgers*, 121 S.Ct. at 1996.

Justice Breyer also wrote:

> Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write

> to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention.

Id.

In this case, the warnings were held to be insufficient precisely because they did not advise the defendant of that same "essential *Miranda* element," the right to the actual presence of an attorney during interrogation. Therefore, since the holding in *Powell* remedies the concerns of the Justices in *Bridgers*, there is no need for this Court to intervene.

C. The opinion of the Second District Court of Appeal in this case shows that, with or without the confession in question here, the evidence was insufficient to convict Respondent; therefore, any pronouncement by this Court would be irrelevant in this case.

Respondent is serving a sentence in a case in which an appellate court has questioned the sufficiency of the evidence with or without the confession. In the decision in the Second District Court of Appeal in Respondent's initial appeal (*Powell v. State*, 969 So.2d 1060 (Fla. Dist. Ct. App 2007); (Appendix B1-B14)), the court commented on a corpus delicti defect that Respondent's trial counsel failed to raise. In footnote number 7, the court wrote:

> Although it was not argued in the trial court, a possible corpus delicti issue exists. In order to introduce Mr. Powell's confession, the State was required to prove that Mr. Powell constructively possessed the weapon. The general order of proof is to show

> that a crime has been committed and then that the defendant committed it. *Spanish v. State*, 45 So. 2d 753, 754 (Fla. 1950); *see State v. Allen*, 335 So. 2d 823, 825-825 (Fla. 1976). A defendant's confession or statement "may be considered in connection with other evidence" but corpus delicti cannot rest upon the confession or admission alone. *Cross v. State*, 119 So. 2d 380, 384 (Fla. 1928). Before a confession or statement may be admitted there must be prima facie proof tending to show the crime was committed. *Farinas v. State*, 569 So. 2d 425 (Fla. 1990); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984); *Frazier v. State*, 107 So. 2d 16, 26 (Fla. 1958). In the present case, although Mr. Powell stipulated he was a convicted felon, there was no independent proof that he possessed a firearm. There were several other adults in the apartment at the time of Mr. Powell's arrest. The State did not introduce forensic evidence from the gun or elicit any testimony that would place the firearm in Mr. Powell's possession. Simply put, there was no evidence other than the unwarned statements Mr. Powell made to establish that a crime had been committed.

Powell, 969 So.2d at 1064 n.7; (Appendix, Pages B6-7).

In other words, since possession of a firearm is not a crime, the State of Florida had to prove that the firearm was possessed by a convicted felon, *i.e.*, Respondent, before there would have been a sufficient corpus delicti for admission of the confession. Therefore, even if this Court were to reverse, and Mr. Powell's conviction were affirmed, in light of the opinion of the Second District Court of Appeal, Mr. Powell would be granted a new trial on motion for post-conviction relief alleging ineffective assistance of trial counsel. Since there is no corpus

delicti independent of Mr. Powell's confession, the confession will be inadmissible nonetheless. Therefore, because whatever decision this Court makes will be irrelevant to the outcome of the case, certiorari is not appropriate.

D. Contrary to Petitioner's assertions, there is no ongoing conflict among the courts; and this case does not conflict with most cases cited by Petitioner because the facts are distinguishable.

Rule 10 of the Supreme Court Rules provides that a petition for writ of certiorari will be granted only for "compelling reasons." Under the rule, those reasons include: "(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

In this case, the defect in the *Miranda* warnings is not a minor defect. The warning form read to Respondent and presented to him to sign informed him only that he had "the right to talk to a lawyer before answering any of our questions," and that he had "the right to use any of these rights at any time you want during this interview." *Powell*, 998 So.2d at 532. The clear implication is that Respondent's right to an attorney was limited to a conversation with counsel before he began answering questions. There is no mention of the right to the presence of counsel at any time.

Many of the cases cited by Petitioner as conflicting with *Powell* are not in actual conflict because in those cases the suspects were informed they had a right to counsel without any qualifying or limiting language. For example, in *United States v. Adams*, 484 F.2d 357 (7th Cir. 1973), an officer testified that he recited "the right to remain silent, right to counsel, and if they haven't got funds to have counsel, that the court will see that they are properly defended." *Id.* at 361. *See also United States v. Lamia*, 429 F.2d 373, 376-77 (2d Cir. 1970)("Lamia had been told without qualification that he had the right to an attorney and that one could be appointed if he could not afford one."); *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996)(warning advising "you have the right to an attorney," because of its generality, communicated an immediate and continuing right without qualification); *United States v. Burns*, 684 F.2d 1066, 1074-75 (2d Cir. 1982)(warning informing defendant he had a right to an attorney was sufficient, but court urged law enforcement to make explicit the right to have an attorney present during questioning); *United States v. Caldwell*, 954 F.2d 496, 502 (under "plain error" standard for unpreserved error, ambiguous warning "you have a right for an attorney" was not misleading because it did not suggest a false limitation); *People v. Prim*, 289 N.E.2d 601, 603-04 (Ill. 1972)(*Miranda* warning that defendant had a right to have counsel present sufficient).

Petitioner's claim that the "purported problem continues to be a recurring one" is belied by the fact that all of the allegedly conflicting cases cited by Petitioner were decided before 1996, and most were decided between 1968 and 1976. Petitioner also cites to the unpublished opinion of the Eleventh Circuit in *United States v. Harris*, 151 Fed. Appx. 882, 885 (11th Cir. 2005). *Harris* does not conflict with the holding in *Powell*.

In *Harris*, the Eleventh Circuit specifically recognized that *Miranda* required that before a person in custody is interrogated "the person must be clearly informed he has the right to consult with a lawyer and to have a lawyer with him during interrogation." *Id.* at 885. In *Harris* the defendant did not claim the *Miranda* warnings read to him at the time of arrest and while he was incarcerated in a holding cell at the jail were insufficient. Instead, Harris claimed the warnings read to him 15 minutes after the last sufficient warning, immediately before his taped interview, failed to advise him of his right to counsel. The *Harris* court held that the fact that the final warnings were "somewhat incomplete" did not affect the sufficiency of the warnings in their totality. Therefore, *Harris*, whether or not it has precedential value as an unpublished opinion, does not conflict with the holding in *Powell*.

Petitioner also urges this Court to grant certiorari in this case to correct an "intra-circuit" conflict allegedly created by

Bridgers v. Dretke, 431 F.3d 853 (5th Cir. 2005), *cert. denied*, 548 U.S. 909, 126 S.Ct. 2961, 165 L.Ed.2d 959 (2006). First, any intra-circuit conflict should be resolved in any future cases by use of *en banc* proceedings. More importantly, however, is the fact that there is no conflict.

Bridgers was told he had "the right to the presence of an attorney/lawyer prior to any questioning." *Id.* at 856. On direct appeal in the state court, the court rejected Bridgers' argument that the warnings were insufficient because they did not explicitly state he had the right to consult an attorney during questioning. This Court denied certiorari; but as related above, the court issued a statement from three Justices expressing their concern that the warnings omitted "an essential *Miranda* element." *Bridgers v. Texas*, 532 U.S. at 1034. Bridgers then filed a federal habeas petition, which was denied, and that appeal went to the Fifth Circuit. (*Bridgers v. Dretke*, 431 F.3d 853).

The Fifth Circuit made it clear that the standard of review for an appeal of a habeas proceeding under the Antiterrorism and Effective Death Penalty Act (AEDPA) requires deference to the lower court unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Bridgers*, 431 F.3d at 857 (quoting AEDPA, 28 U.S.C. §2254(d)). The Fifth Circuit merely held that Bridgers failed to show the state

court's decision (that he was adequately advised of his Fifth Amendment rights) was "objectively unreasonable" under the AEDPA. The Fifth Circuit found that the state court considered and "applied controlling Supreme Court precedent and properly recognized that *Miranda* required advising a suspect that he is entitled to have counsel present during interrogation." *Bridgers* at 858. Because the standard of review was significantly different on habeas review, there is no inter-circuit conflict with cases that held otherwise on direct review. *See, e.g., Atwell v. United States*, 398 F.2d 507, 510 (5th Cir. 1968).

Therefore, for the reasons above, compelling reasons for certiorari are not presented in this case.

II

DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Petitioner's question heading invites a discussion of the merits of the case. Nevertheless, the heading is not accurate in that the *Powell* court did not hold that failure to provide "express" advice of the right to presence of counsel during interrogation was required. The court held that the right had to be "clearly" imparted regardless of the words used. The heading is also misleading because the warnings read to Respondent did not tell him he had the "right to talk to a lawyer before questioning." The printed warnings advised, "You have the right to talk to a lawyer before answering any of our questions." This implied that the limited right to "talk to" a lawyer terminated once Respondent began answering questions.

The right to the presence of a lawyer is never mentioned. That fact is very important because, unless a suspect is told he has the right to have a lawyer actually present with him, a suspect would assume his right to "talk to" a lawyer was limited to a phone conversation. Because there is no mention of the time period during interrogation, the implication is that the conversation is permitted "before answering" and not permitted

during interrogation. Also, the warnings certainly did not advise Respondent he had "the right to use the right to consult a lawyer at any time during questioning." Instead, Respondent was told, "You have the right to use any of these rights at any time you want during this interview."

The Florida Supreme Court found that the final sentence, "You have the right to use any of these rights at any time you want during this interview," did not reasonably convey the right to have an attorney present during the interrogation, because Respondent was "never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation." *Powell* at 541. The court reasoned:

> The catch-all language did not effectively convey to Powell his right to the presence of counsel before and during police questioning. This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

Id. at 541.

In order to conclude that these warnings comply with *Miranda*, Petitioner has to engage in a "strained reading." *See* Petition, pages 20-21. *Miranda* warnings are almost always read to suspects who are not versed in Constitutional law. In fact, many suspects are not literate. As such, *Miranda* warnings must be simple and

straightforward. A warning that must be analyzed in order to divine its meaning does not serve the purpose of the warnings. The requirement that a suspect be informed he has the right to the presence of a lawyer during questioning, however that may be worded, is much shorter and easier than the convoluted language contained in the form that was composed and printed for law enforcement use in this case.

In this case, the defective warnings required exclusion, and the exclusion required reversal because the evidence was insufficient without the confession. *See Powell*, 998 So.2d 541-42. Contrary to Petitioner's conclusion that the holding produced an "absurd result," no other result is reasonable.

Miranda was decided in 1966, and its requirements have become "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326 (2000). In *Dickerson*, this Court reaffirmed *Miranda* and rejected the idea that a case-by-case determination of the voluntariness of a confession in the absence of *Miranda* warnings would comply with Constitutional prohibition against compelled testimony. The remedy for failure to comply with *Miranda* has always been exclusion of the confession for purposes of the prosecution's case-in-chief.

No "good-faith" exception can be made for defective *Miranda* warnings contained in pre-printed forms. A violation of a suspect's Fifth Amendment (and Article I, §9) Constitutional

rights does not occur at the time law enforcement officers fail to convey adequate *Miranda* warnings, it occurs when the statements produced as a result of the faulty warnings are introduced into court. *See United States v. Patane*, 542 U.S. 630, 641-642, 124 S.Ct. 2620, 2628-29 (2004)(plurality opinion)(failure to give *Miranda* warnings does not violate a suspect's constitutional rights or even the *Miranda* rule; the violation occurs only upon admission of the unwarned statement at trial (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)). The Self-Incrimination Clause contains its own exclusionary rule. *See Patane*, 542 U.S. at 640 (Unlike the Fourth Amendment, the Self-Incrimination Clause contains its own self-executing exclusionary rule by providing "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."). Therefore, it would be incongruous to say that a court could violate the suspect's constitutional right against self-incrimination (for the first time) by admitting the confession solely because the police relied "in good faith" on a misleading and insufficient pre-printed *Miranda* form.

Even if a good-faith exception were logically and legally permissible, this case illustrates why exclusion of the confession is the only practical solution. If courts admitted statements at trial on the grounds that officers were allowed to rely on these forms, regardless of whether the content of the form conflicted

with their own understanding of *Miranda* requirements, law enforcement agencies would be free to draft confusing and misleading forms. In fact, there would be an incentive to do so.

Because the result in this case was a product of carefully and correctly applied precedent, this Court should deny certiorari.

CONCLUSION

Because the *Powell* court applied the correct rules of law to this unique situation, in a case in which the evidence is insufficient with or without the confession, and because the result rested on adequate and independent state grounds, this Court should deny certiorari.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
FILED
MAY 15 2009
OFFICE OF THE CLERK

(2)

Case No. 08-1175

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,
v.
KEVIN DWAYNE POWELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA
REPLY

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QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A SUSPECT MUST BE EXPRESSLY ADVISED OF HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION, CONFLICTS WITH *MIRANDA v. ARIZONA* AND DECISIONS OF FEDERAL AND STATE APPELLATE COURTS.

II

AND IF SO, DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

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USE OF AN ALLEGEDLY DEFECTIVE *MIRANDA* WARNING DOES NOT REQUIRE SUPPRESSION OF AN OTHERWISE VOLUNTARY STATEMENT WHEN LAW ENFORCEMENT OFFICERS REASONABLY RELIED UPON A STANDARD WARNING INFORMING THE DEFENDANT OF HIS RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING AND THERE IS NO EVIDENCE THAT THE DEFENDANT WAS CONFUSED OR MISLED BY THE WARNING.

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REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE FLORIDA SUPREME COURT ADDS TO THE RECURRING CONFLICT AMONG STATE AND FEDERAL COURTS REGARDING THE PROPER INTERPRETATION OF THIS COURT'S DECISION IN *MIRANDA*[1] AND ITS PROGENY.

Petitioner relies on the arguments as set forth in its Petition for Writ of Certiorari establishing a conflict among state and federal courts.

Respondent's contention that the opinion of the Florida Supreme Court in *State of Florida v. Kevin Dewayne Powell*, 998 So. 2d 531 (Fla. 2008) is founded on independent and adequate state Constitutional grounds and Florida case law interpreting Article I, §9 of the Florida Constitution, is erroneous.[2] In *Traylor v. State*, 596 So. 2d 957, 963-67 (Fla. 1992), the Florida Supreme Court promulgated the required content for a rights warning in Florida, stating it was

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[1] Miranda v. Arizona, 384 U.S. 436 (1966)

[2] Article I, Section 9, of the Florida Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

guided by "*Miranda* and its progeny." The court essentially replicated the rights warning language under *Miranda*: "[W]e hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them." *Traylor*, 596 So. 2d at 965-66.

In *Powell*, the Florida Supreme Court was not addressing state law but, rather, was construing this Court's precedent in *Miranda* and its progeny. Similarly, in *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485 (1996), this Court found the Pennsylvania Supreme Court's ruling that the warrantless search of an automobile violated the Fourth Amendment, was not based upon adequate and independent state law grounds and was subject to review. In *Labron* this Court stated:

> The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception, see, *e.g.*, 543 Pa., at 95, 669 A 2d, at 921 (observing *Commonwealth v. Holzer*, 480 Pa. 93, 103, 389 A.2d 101, 106 (1978), cited

> *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)); 543 Pa., at 100, 669 A.2d, at 924 (stating *Commonwealth v. White*, *supra*, rested in part upon the Pennsylvania Supreme Court's analysis of *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970)). The law of the Commonwealth thus appears to us "interwoven with the federal law, and ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S., at 1040-1041, 103 S.Ct., at 3476.

Lebron, 518 U.S. at 941.

The Florida Supreme Court's following conclusion in *Powell* left no doubt that it was based squarely upon *Miranda*: "Thus, we also agree with the Second District that to advise a suspect that he has the right 'to talk to a lawyer before answering any of our questions' constitutes a narrower and less functional warning than that required by *Miranda*." 998 So. 2d at 542. Therefore, the Florida Supreme Court decided an issue of constitutional law, guided and governed by *Miranda* precedent from this Court. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically

refrains from imposing them."); *California v. Beheler*, 463 U.S. 1121, 1123 n.1 (U.S. 1983) (although *Beheler* suggested that decision below rested upon independent state "custody" grounds, "it is clear from the face of the opinion, however, that the opinion below rested exclusively on the court's 'decision on the *Miranda* issue.'") (quoting the lower court). Thus, certiorari review is appropriate in this case.

II

USE OF AN ALLEGEDLY DEFECTIVE *MIRANDA* WARNING DOES NOT REQUIRE SUPPRESSION OF AN OTHERWISE VOLUNTARY STATEMENT WHEN LAW ENFORCEMENT OFFICERS REASONABLY RELIED UPON A STANDARD WARNING INFORMING THE DEFENDANT OF HIS RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING AND THERE IS NO EVIDENCE THAT THE DEFENDANT WAS CONFUSED OR MISLED BY THE WARNING.

Respondent asserts there is no "good-faith" exception for a defective *Miranda* warning contained in a pre-printed form. (Respondent's Brief in Opposition, p.31). Even assuming the *Miranda* warning in this case was deficient for not informing *Powell* expressly of his right to counsel during questioning, suppression is an inappropriate and harsh remedy. This Court should grant review of this case to consider whether law enforcement officers' good faith reliance upon a technically defective rights warning requires suppression of an otherwise voluntary statement.

Miranda and its progeny were issued to effectively implement and provide guidelines on the right to remain silent and to deter police misconduct. In this case, Powell, a convicted felon, was arrested after the officers found a firearm hidden under the bed near the hallway where Powell was located. Powell was arrested and transported to the police station for questioning. The detectives used a printed, Hillsborough County Sheriff's Office waiver of rights form which they read to Powell and that he read and initialed. Suppression of the defendant's confession exacts a harsh and unwarranted penalty in this case, one not justified in furtherance of *Miranda* or the exclusionary rule. *See Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 2614, 159 L. Ed. 2d 643 (2004) (Kennedy, J., concurring) ("Evidence [obtained in violation of *Miranda*] is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction.")

In the years since *Miranda* was decided, this Court has utilized a common sense approach, limiting suppression to those cases involving police misconduct and where the purposes of the exclusionary rule can be furthered. *Oregon v. Elstad*, 470 U.S. 298 (1985), reflects such a pragmatic approach.

In *Elstad*, a suspect made an initial incriminating statement at his home. The suspect had not received a *Miranda* warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time. The suspect was taken to the police station, where he received a *Miranda* warning, waived his rights, and made a second statement. He later argued that the postwarning statement should be suppressed because it was related to the unwarned first statement, and likely induced or caused it. This Court held that although a *Miranda* violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression." *Elstad, supra*, at 308 (citing *Michigan v. Tucker*, 417 U.S. 433, 445, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974)). "Errors [that] are made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." 470 U.S. at 308-309. *See also Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (if not actually coerced, a statement obtained in violation of *Miranda* can be used for impeachment, so that the truth finding function of the trial is not distorted); *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (exception to *Miranda* based upon concerns of public safety); *United*

States v. Patane, 542 U.S. 630, 124 S. Ct. 2620, 2626, 159 L. Ed. 2d 667 (2004) (plurality opinion) (physical evidence obtained in reliance on statements taken in violation of *Miranda* is admissible).

A similar balancing approach was employed by the Fourth Circuit in *United States v. Nichols*, 438 F.3d 437, 444 (4th Cir. 2006) to allow use of evidence in sentencing which was excluded from the guilt phase based upon violations of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981). The Fourth Circuit stated:

> In sum, we conclude that in cases such as this one--where there is no evidence that an illegally obtained statement was actually coerced or otherwise involuntary--the substantial burden on the sentencing process resulting from exclusion of that statement outweighs any countervailing concerns about police deterrence or unreliable evidence. As with evidence obtained in violation of the Fourth Amendment, "the disadvantages of applying the [*Miranda* exclusionary rule at sentencing are large, [and] the benefits small or non-existent." *Lee*, 540 F.2d at 1212. We therefore conclude that in most cases, including this one, a district court may consider at sentencing statements obtained in violation of *Miranda* and *Edwards*.

Absent coercive tactics by police, there is nothing inherently unreliable about otherwise voluntary statements obtained in violation of *Miranda*. *See e.g. Oregon v. Hass*, 420 U.S. 714, 722-23 (1975) (in a case where police failed to honor defendant's request for counsel, no indication that defendant's subsequent statements were involuntary or coerced). In this case, there is no question that Powell's statement was voluntary; the consent form and the unrebutted testimony from the suppression hearing below, including Powell's own testimony, establish this fact.[3] The evil addressed by *Miranda* and its progeny is the coercion of involuntary confessions, not the inducement of voluntary confessions. *Oregon v. Elstad*, 470 U.S. 298(1985) (far from being prohibited by the Constitution, "admissions of guilt

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[3] As dissenting Justice Wells noted in this case: "Finally, I do not join the majority's decision because it expands upon the *Miranda* warning criteria set by the Supreme Court, resulting in an extreme, unworkable application of the *Miranda* decision. This needless complication is contrary to the spirit of the Supreme Court's decision, in which it stated that the 'limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement.' 384 U.S. at 481. The majority's decision to require overly detailed *Miranda* warnings will unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel. Additionally, it will result in reversing the convictions of individuals who have confessed to crimes based upon a holding that is at most an extreme technical adherence to language and that has no connection with whether the person who confessed understood his or her rights." *Powell*, 998 So. 2d at 545.

by wrongdoers, if not coerced, are inherently desirable.").

Powell was advised of his right to counsel prior to answering questions, a right he declined to exercise. The State is not suggesting that *Miranda*'s exclusionary rule be abandoned in its entirety. Rather, it should not be applied in cases like this where law enforcement officers reasonably rely upon an allegedly technically defective form where there is no evidence that the defendant was in fact confused or otherwise misled about his right to counsel. Since the statement is otherwise voluntary there is simply no police misconduct to deter. *Michigan v. Tucker*, 417 U.S. 433, 447-50 (1974) (finding that neither deterrence nor trustworthiness rationales of Fifth Amendment exclusionary rule supported exclusion of evidence at issue; emphasizing the need to "weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence"). In this case, reversal of Powell's conviction, particularly as a convicted felon, exacts a harsh penalty with its attendant financial cost to the State and the citizens of Florida.

The State respectfully requests review of this case to determine whether the exclusionary rule was appropriately applied. Because, as noted above, the recurring question of the sufficiency of *Miranda* and the specific warnings at issue in this case may very well impact a large number of

criminal cases across this country, it is important for this Court to determine the appropriate remedy for an allegedly technically defective warning; that is, whether suppression is an appropriate and necessary remedy for an otherwise voluntary statement in the absence of police misconduct.

The Florida Supreme Court, and other courts in interpreting a defendant's federal constitutional right to be explicitly informed of his right to have counsel present during custodial questioning, is demanding more from law enforcement than this Court ever envisioned or deemed necessary in *Miranda* and its progeny in order to protect individuals' Fifth Amendment rights. And thus has eliminated otherwise valid confessions resulting in the unnecessary exclusion of critical evidence, resulting in an even more unreasonable narrowing in the application of the exclusionary rule.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner, the State of Florida respectfully requests this Honorable Court GRANT the Petition for Writ of Certiorari.

Respectfully Submitted,

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JOINT APPENDIX

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(4)

FILED
AUG 27 2009
OFFICE OF THE CLERK

No. 08-1175

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

KEVIN DEWAYNE POWELL,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 19, 2009
CERTIORARI GRANTED JUNE 22, 2009

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Date 02-10-07

TAMPA POLICE DEPARTMENT
CONSENT AND RELEASE

Report No. 07-907

☑ CONSENT TO BE INTERVIEWED CONCERNING AN OFFENSE OF Robbery

Init. You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

I, KEIRO DWAYNE POWELL, have had these rights read to me; I understand them and I am willing to talk to you at this time.

☐ CONSENT TO SEARCH/WAIVER OF SEARCH WARRANT

I, Init. hereby voluntarily give my full consent that the premises and/or building(s) or enclosure(s) located therein, and/or vehicle(s) located at: _____ may be searched by an authorized law enforcement officer. I give this consent freely and voluntarily, without compulsion, threat, or promise of any kind. I understand my constitutional right to refuse a search of said premises and/or vehicle(s) without a search warrant and it is my intention to fully and completely waive such right by this consent. I further understand that anything or any article that may be found in this search of the premises and/or vehicle(s) will be used at trial in any matter of which I may be accused.

☐ MISSING PERSONS/JUVENILE RUNAWAY AFFIDAVIT

I, Init. certify that _____, DOB _____ has been missing since _____. I am the ☐ parent, ☐ legal guardian, ☐ family member, ☐ physician and/or authoritative source of the above described person, and he/she is missing due to:
☐ unknown circumstances; ☐ in the company of another person under circumstances indicating physical danger;
☐ involuntary disappearance; ☐ physical or mental disability; ☐ runaway.

☐ SWORN STATEMENT ACKNOWLEDGEMENT

I, Init. swear or affirm that my statements made to _____ on (Date) _____ concerning the offense of _____ are true and voluntarily made. I further certify that I am aware of the following statute and penalties as provided by 837.05, 775.082, and 775.083, to wit: Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable by a definite term of imprisonment not exceeding one year and/or a fine not exceeding $1,000.00.
I further agree to notify the Tampa Police Department immediately upon recovery of my property by myself or any other law enforcement agency or any other person.

☐ RELEASE OF RESPONSIBILITY

I, Init. authorize officer(s) _____ City of Tampa Police Department, to leave my vehicle, to wit: _____ (Year, Make, Model, Tag No.) _____ with/parked at: _____
I expressly release the above named officer(s) and the City of Tampa from any liability whatsoever due to damage, loss or theft of the above described vehicle.

☐ COMPLAINT WITHDRAWAL AFFIDAVIT

I, Init. certify that I am satisfied with the investigation conducted by the Tampa Police Department concerning the offense of _____ and I am hereby withdrawing my complaint. I understand a suspect in this case is _____ and I may request an arrest warrant at a later date if I so desire.

Signature

The foregoing instrument was sworn to before me this 10 day of Aug 2007 by Keiro Powell

Personally known ___ or Produced Identification ___ Type of Identification produced _____

Notary Public/Law Enforcement Officer Signature — Notary Public / Law Enforcement Officer Print

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TPD 310 (4/01)

IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT LAKELAND, FLORIDA

KEVIN DEWAYNE POWELL
DEFENDANT-APPELLANT

CASE NO. 04-CF-15088

VS.

STATE OF FLORIDA
PLA1NTIFF-APPELLEE

APPELLATE CASE NO 05-0646

APPEAL FROM THE CIRCUIT COURT, CRIMINAL DIVISION, OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

THE HONORABLE DANIEL PERRY JUDGE OF CIRCUIT COURT CRIMINAL DIVISION

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CIRCUIT CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

Case Nos.: 04-015088

vs.

Division: A

KEVIN DEWAYNE POWELL,
Defendant.
_____/

This case came on to be heard before the HONORABLE Daniel L. Perry, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on January 25, 2005, commencing at approximately 1:30 p.m.

APPEARANCES:

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On behalf of the Defendant.

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(WHEREUPON, THE FOLLOWING PROCEEDINGS ENSUED IN OPEN COURT.)

THE COURT: Okay. All right, the jury out there?

MS. BURNETT: The State's ready, Judge.

MS. FREDERIKSEN-CHERRY: Judge, we have one issue that we need to address.

THE COURT: What is it?

MS. FREDERIKSEN-CHERRY: The issue is that I've been handed just now a notice that the state intends to seek a habitual felony offender enhancement so I was just discussing that with my client and I was just advising him that on the felon in possession that is going to potentially increase his maximum exposure to 30 years with a three year minimum mandatory if Your Honor should use his discretion and sentence him to the habitual felony offender.

Ms. Burnett had renewed the three year minimum mandatory and we were just discussing that, Judge.

I understand that he is, at this time wants to decline the three year minimum mandatory.

THE COURT: Is that right, sir?

THE DEFENDANT: Yes, sir.

THE COURT: You do understand that the state is seeking an enhancement and I mean they don't even

have to tell him that until after there has been a conviction really if they don't want to.

MR. ALLEN: It's just prior to sentencing.

THE COURT: But because of the sentencing enhancement you're looking at a maximum of what, Ms. Burnett?

MS. BURNETT: Thirty years.

THE COURT: Thirty years in the Florida State Prison. Is it a min/man?

MS. FREDERIKSEN-CHERRY: It is charged actual possession with a three year minimum mandatory.

THE COURT: Okay, so it is a 30 years with a three year minimum mandatory so as HFO they're not entitled to any parole or those kind of release programs if you're an HFO you're probably going to serve probably every day of 30 years if they convict you; you understand that, sir?

THE DEFENDANT: I understand that, sir, but the simple fact is that you know my religion I was to stand firm on my conviction and I don't believe God will take away my life like that.

THE COURT: Okay. That's entirely your decision, sir.

MS. FREDERIKSEN-CHERRY: I just want to put on the record that I have advised him to very

strongly consider the three year minimum mandatory offer.

THE COURT: okay, well, you know, it's up to you what you all want to do.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Good afternoon, ladies and gentlemen. First of all, the bailiff indicated to me that some of you asked about taking notes. I'm going to ask that you not take notes and just pay close attention. I don't think the State is going have a whole lot of witness so I think you will do better if you just pay attention to what the testimony is.

Ladies and gentlemen of the jury, you have been sworn and selected as the jury to try the case of the State of Florida versus Kevin Powell.

This is a criminal case. Mr. Powell is charged with the crime of felon in possession of a firearm actually possessing it. The definition of the elements of this crime will be explained to you later.

It is your solemn responsibility to determine if the state has proven its accusations beyond a reasonable doubt against Mr. Powell. Your verdict must be based solely on the evidence or the lack of evidence and the law.

The information is not evidence and you are not to consider it as such. It is the judge's responsibility to decide which laws apply to this case and to explain those laws to you. It will be your responsibility to decide

what the facts of the case may be and to apply the law to those facts thus the province of the Court and the province of the jury are well defined and they do not overlap. This is one of the fundamental principles of our system of justice.

Before proceeding further it will be helpful if I explain how a trial is conducted.

At the beginning of the trial the attorneys will have an opportunity if they wish to make an opening statement. The opening statement gives the attorneys a chance to tell you what evidence they believe will be introduced in this trial.

What the attorneys say is not evidence and you are not to consider it as such. Following the opening statements witnesses will be called to testify under oath. They'll be examined and cross-examined by the attorneys. Documents and other exhibits may also be presented as evidence.

After the evidence has been presented the attorneys will have an opportunity to make their final argument.

Following the arguments by the attorneys the Court will instruct you on the law applicable to this case. You should not form any definite nor fixed opinions on the merits of this case until you have heard all of the evidence, the arguments of the lawyers and my instructions on the law. Until that time you are not to discuss this case among yourselves.

During the course of the trial the court may take

recesses during which you will be permitted to separate and go about your personal affairs. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case.

If anyone attempts to say anything to you or in your presence about the case inform them you're on the jury trying the case and ask them to stop. If they persist leave them at once and immediately report the matter to a bailiff who will then advise me.

This case must be tried only on the evidence presented during the trial in your presence, in the presence of the defendant, the attorneys and the judge.

Jurors must not conduct any investigation of their own. Accordingly you must not visit any of the places described in the evidence and you must not read or listen to any reports about this case. Further you must not discuss this case with any person and you must not speak with the attorneys, the defendant or the witnesses about any subject until your deliberations are finished.

In every criminal proceeding a defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove his innocence. From the exercise of a defendant's right to remain silent a juror is not permitted to draw any inference of guilt and the fact that a defendant did not take the witness stand must not influence your verdict in any manner whatsoever.

The attorneys are trained in the rules of evidence and trial procedure and it is their duty to make all

objections they feel are proper. When an objection is made you should not speculate on the reason why it is made. Likewise when an objection is sustained or upheld by me you must not speculate on what might have occurred had the objection not been sustained nor what a witness might have said had they been permitted to answer.

The State ready to proceed?

MS. BURNETT: Yes, the State is ready.

THE COURT: Defense?

MS. FREDERIKSEN-CHERRY: Yes, Your Honor.

THE COURT: You wish to make an opening statement, Ms. Burnett?

MS. BURNETT: Yes, Your Honor.

THE COURT: You may proceed.

MS. BURNETT: Thank you. Good afternoon, ladies and gentlemen. Again on behalf of the State of Florida, I represent the State of Florida in this case, the State of Florida versus Kevin Powell and he is as you were told yesterday he is charged with being a felon, a convicted felon in possession of a firearm.

I believe that the issue is whether or not he was a convicted felon and whether his civil rights had not been restored will not be an issue.

The question is simply on August 10th of 2004,

did the defendant possess a firearm? And I believe that this will be a simple case and as we discussed every person who is charged with a felony is entitled to a trial by jury.

The evidence will be that on August 10th you will hear from Detective Augeri and he along with Detective Estevez were involved in an investigation and they went to the home where the defendant was living.

At that point they approached the person who was actually on the lease the person who had custody of that particular residence and that person gave consent to search the residence.

When they initially when they came in they saw defendant leave the bedroom. The officers went in that bedroom and they searched that bedroom and they found a loaded nine millimeter weapon underneath the bed of that particular residence where the bedroom where the defendant had just come out.

Later on the defendant was interviewed by Detective Estevez and during that interview the detective the defendant at that point admitted that the firearm was in fact his and that he knew he was a convicted felon and that he had bought it for protection and that he didn't leave home without it.

So after you have heard the evidence that the State intends to present I believe that applying the evidence to the law as required of you as jurors that you will return the only verdict that's available and you will find the defendant guilty as charged of being a felon and in possession of a firearm.

THE COURT: You wish to make an opening statement?

MS. SHROYER: Yes, Your Honor.

THE COURT: You may proceed.

MS. SHROYER: Good afternoon, ladies and gentlemen of the jury. On behalf of myself and co-counsel and Mr. Kevin Powell I just want to thank you again for your time today.

We discussed yesterday, how much we really appreciate your time and being here and how important it is that you pay close attention to the short amount of time that you are here.

Because although this is a simple case as the state attorney has just mentioned it is a very serious offense and it has consequences for Mr. Powell's life so we would ask that up front that you give us your undivided attention for these next couple of hours this afternoon.

You heard the state attorney and the Judge mention the only issue that we're going to talk about today is possession and we talked yesterday during jury selection about common sense and what is reasonable and your life experiences on earth and I would ask again I ask you to call on all of those things when thinking about what does possession mean? What does actually possessing something mean?

How do you know if someone knows something is

somewhere? It all seems to extract now but when you hear the evidence I want you to listen for those things and you'll hear common sense what kind of evidence would you expect to hear to prove that?

We talked yesterday about the burden is on the State and what evidence would you expect them to put on to prove to you that someone is in actual possession of anything a gun or anything else. That's simply what it boils down to today.

Remember you are the trier of fact. You're going to hear evidence today from the defendant witnesses but ultimately it is you who is going to decide what those facts mean.

I want you to do that please by listening closely to the evidence and again applying your common sense.

I just ask that you just listen closely when the Judge gives you instructions on the law at the end of the testimony and apply those facts to that law to the very best of your ability and that's all we can ask you to do today and when you do that we believe that you will find Mr. Powell not guilty of felon in possession of a firearm. Thank you.

THE COURT: Ms. Burnett, call your first witness.

MS. BURNETT: Before doing that can I approach Your Honor and ask that you read the stipulation into evidence.

MS. FREDERIKSEN-CHERRY: No objection.

THE COURT: Ladies and gentlemen, we have a stipulation before we begin the trial.

In the Circuit Court of the Thirteenth Judicial Circuit State of Florida, in and for Hillsborough County, Criminal Justice Division, State of Florida versus Kevin Powell , case number 04-15088, Division "A" stipulation, on the 10th of August 2004, the defendant Kevin Powell was a convicted felon and his civil rights have not been restored. This is a stipulation between counsel for both parties as well as Mr. Powell.

Call your first witness.

MS. BURNETT: The State calls Detective Augeri.

THE COURT: Detective Augeri. If you would step up here and have a seat in the witness chair, please, sir. Raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Put your hand down and state your name for the record and if you will spell your last name.

THE WITNESS: Salvatore Augeri, A-U-G-E-R-I.

THE COURT: You may inquire.

WHEREUPON:

SALVATORE AUGERI

was called as a witness on behalf of the State and, having been first duly sworn and/or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BURNETT:

Q. Detective, how long have you been employed with the Tampa Police Department?

A. Twenty years.

Q. And during this time what -- what division are you assigned to now?

A. Presently I'm with our robbery squad.

Q. Back on August the 10th, 2004, were you also assigned to that division?

A. Yes.

Q. And as part of your duties and responsibilities did you have occasion to investigate someone who became known to you as Kevin Powell?

A. Yes, I did.

Q. Do you see Kevin Powell in the courtroom today?

A. Yes, the gentleman in the tan shirt.

THE COURT: Let the record reflect he's identified the defendant.

BY MS. BURNETT:

Q. And back on August 10th, 2004, did you have an occasion to enter a residence at 1512 West Powhatten Avenue in Tampa?

A. Um, no, I was in the address of 308 Woodlawn.

Q. Okay, I'm sorry and is that in Hillsborough County?

A. Yes.

Q. Okay, and when you first arrived at that residence who did you come in contact with?

A. Um, initially I met with Detective Estevez and other members of our squad from information from Estevez Mr. Powell was at that residence. When I first arrived there Detective Estevez and myself, Detective Dinsmore and a female, um, Shazeena West was present.

Q. All right, when you came contact with Shazeena West had you seen personally seen the defendant Kevin Powell at that time?

A. Um, no.

Q. Were you at some point able to enter into that residence?

A. Yes.

Q. And did she give you consent to enter that residence?

A. Yes, she advised us that he wasn't home but we could look.

MS. FREDERIKSEN-CHERRY: Judge, I'm going to object to hearsay and ask to strike that answer.

THE COURT: I'll sustain the objection. Ask another question.

BY MS. BURNETT:

Q. When you entered into the residence what did you do inside the residence?

A. Searched for Mr. Powell.

Q. And did you see Mr. Powell?

A. When I saw him, um, yes, he was in the upstairs hallway coming from the near southeast corner bedroom.

MS. FREDERIKSEN-CHERRY: I'm sorry, Judge, I didn't hear the last part of that answer.

THE COURT: He was upstairs. Go ahead.

THE WITNESS: Coming out of the southeast corner bedroom in the hallway.

MS. FREDERIKSEN-CHERRY: Thank you.

BY MS. BURNETT:

Q. Was there anyone else other than the defendant upstairs at that time other than law enforcement?

A. No.

Q. And when you saw the defendant coming out of that bedroom, did you search that bedroom?

A. Eventually it was searched, yes.

Q. And when you searched the bedroom where you had seen the defendant where did you search inside the bedroom?

A. Um, initially we searched all throughout the bedroom and there was a couple of items that were found in different locations.

Q. Okay. In terms of, um, the evidence that is the subject of this case today where did you find this evidence?

A. Um, it was beneath the bed.

Q. And could you please describe for the jury what you found under the bed?

A. It was a nine millimeter pistol handgun.

Q. Did it have any ammunition?

A. Yes.

Q. And was it loaded?

A. Yes.

Q. And based on your experience as a law enforcement officer, do you have experience with that type of handgun?

A. Nine millimeters in general, yes.

Q. And you were able to confirm whether or not it was a toy, it was not toy?

A. It was not a toy. It was a real firearm.

Q. At that point in time did you retrieve that firearm?

A. Yes, it was retrieved.

Q. And then did you again come in contact with the defendant?

A. Yes, we finished up at 308 Woodlawn and then resumed speaking with him down at 411 Franklin Street at the police department.

Q. Were you present with Detective Estevez when he was speaking with the defendant?

A. Yes.

Q. And at that time was the defendant advised of

his Miranda warnings?

A. Yes, he was.

Q. Was he advised in writing or by card or by memory?

A. Through a signed piece of paper. There's different items on that paper one is Miranda warnings which Detective Estevez read to r. Powell?

Q. You were present?

A. Yes.

Q. And did he indicate at that time that he understood his Miranda warnings?

A. Yes.

Q. He understood that he had the right to remain silent?

A. Yes.

Q. And he understood that he didn't have to say anything he didn't have to talk to you?

A. Yes.

Q. And he understood he had the right to have an attorney present?

A. Yes.

Q. And he willingly at that point agreed to talk to you?

A. Yes.

Q. And then at that point did he make any statements to you regarding the firearm that was found in -- at that location 308 Woodlawn?

MS. FREDERIKSEN-CHERRY: Objection as to foundation. I'd ask to approach, judge.

(A BENCH CONFERENCE WAS HELD, AS FOLLOWS:)

MS. FREDERIKSEN-CHERRY: My objection is as to the validity of the Miranda as listed on this form that the detective is referring to. I believe it is a standard police department form 310 and if you would either allow me to briefly voir dire the witness regarding the issue whether that form contains the right for the person being questioned to have an attorney present during the questioning, I believe that form states that they have the right to have an attorney present before the questioning but not during, Judge.

THE COURT: Okay, you can voir dire him if you want to.

MS. FREDERIKSEN-CHERRY: Yes, please.

(THE BENCH CONFERENCE CONCLUDED.)

BY MS. FREDERIKSEN-CHERRY:

Q. Detective, do you have a form with you that you are referring to?

A. No, Detective Estevez has it.

Q. Do you remember the contents of this form from memory or is there something that would refresh your recollection as to the contents of the form?

A. I pretty much remember it.

Q. You pretty much remember, okay. To be specific are we referring about Tampa Police Department form 310 waiver of listing Miranda warnings as well as a waiver?

A. Yes.

Q. Okay. This is a standard Tampa Police Department form, right?

A. Yes, don't hold me to the number I'm not sure.

Q. Okay, it's typed up?

A. Yes.

Q. It's not something that is handwritten, right?

A. Correct.

Q. In this particular case this is a form that you use as basically for interrogations not only in this case but it is a standard form?

A. Standard form.

Q. And Ms. Burnett was just recently asking you about the questions that were listed on that form that you I guess repeated to my client Mr. Powell before you started interrogating him.

Specifically what I want to focus on is when Ms. Burnett asked you whether you asked him whether he had the right to have an attorney present for the interrogation what I want to ask you specifically is, Detective, did you ask that specific question or did you read the contents of the form off to Mr. Powell?

A. Um, I just witnessed the form being read to Mr. Powell. It was off the form.

Q. It was Detective Estevez, correct?

A. Correct.

Q. Who actually read it?

A. Yes.

Q. Okay, so to the best of your knowledge and experience, Detective Estevez read word for word what was on this form to Mr. Powell?

A. Correct.

Q. Okay, and correct me if I'm wrong, Detective, but isn't it true that on that standard Tampa Police Department form the only question or the only statement I guess that refers to the suspect rights to

have an attorney present refers to having an attorney present before the questioning, not during?

A. Before the questioning, correct.

Q. Correct?

A. Yes.

Q. So, to the best of your recollection this form does not advise the person who is about to be interrogated that they have the right to have an attorney present while you are interrogating them, right?

A. Verbatim it says before, right.

MS. FREDERIKSEN-CHERRY: Thanks. Okay, thank you, no further questions on voir dire, Judge.

THE COURT: Anything further?

MS. FREDERIKSEN-CHERRY: Renew my objection.

THE COURT: You all come up.

(A BENCH CONFERENCE WAS HELD, AS FOLLOWS:)

THE COURT: Anything else?

MS. FREDERIKSEN-CHERRY: No, renewing my objection on foundation.

MS. BURNETT: I think it's been said that if he had asked for an attorney before or during and he didn't request an attorney.

THE COURT: Well, I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection.

MS. FREDERIKSEN-CHERRY: Yes, Judge.

(THE BENCH CONFERENCE CONCLUDED.)

THE COURT: You may proceed.

BY MS. BURNETT:

Q. So, the time then that you were interviewing the defendant, you were present during the interview of the defendant was the defendant aware that you had located a nine millimeter firearm under the bed in the bedroom that had seen him coming from?

A. Yes, he did.

Q. nd then what statement did the defendant make regarding that firearm during the course of this interview?

MS. FREDERIKSEN-CHERRY: Renew my objection, Judge.

THE COURT: Overruled.

A. He advised myself and Detective Estevez that the firearm was his. He had purchased it off the street from somebody for $150. He used it to carry it for protection and um, that he usually had it with him when he left the house and he knew he shouldn't have a pistol.

Q. He indicated that he knew that he shouldn't have a pistol because he was a convicted felon?

A. Correct.

Q. During the time that he was talking to you his answers were given voluntarily?

A. Yes.

Q. And there was -- you didn't threaten him or coerce him in any way to give those?

A. No.

Q. Those particular answers to the questions?

A. No.

MS. BURNETT: I'll pass the witness.

THE COURT: Any questions?

CROSS-EXAMINATION

BY MS. FREDERIKSEN-CHERRY:

Q. Detective, is it fair to say that Detective

Estevez was the primary case agent I don't know exactly what your terminology is but basically the person that is running this particular investigation?

A. Yes.

Q. All right, so when you, um, when you step in to become involved like you told the prosecution really a lot of the information was coming secondhand from Detective Estevez, right?

A. Correct.

Q. So when you first come into contact with Mr. Powell is the first time that you really become actively involved in the investigation?

A. Um, yeah, yes.

Q. And that occurs at the residence that you mentioned previously at 308 Woodlawn, right?

A. Yes.

Q. Are you aware, Detective, I don't know if you were involved in this particular point of the investigation but are you aware that M. Powell was never formally listed as residing there?

A. Yes.

Q. On the lease?

A. Yes.

Q. You're clear of that and the person that you referred to previously I think the person by the name of Shazeena West?

A. I believe that was her first name, yes.

Q. But is there anybody else that, that could be confused with or are we talking about the same person?

A. No, that's her.

Q. Shazeena West, all right, so this person Shazeena West that -- did you personally come in contact with her or did someone else?

A. Detective Estevez did and I witnessed him come in contact with her.

Q. So you were there when Detective Estevez had this conversation with Ms. West, right, at the apartment there at 308 Woodlawn?

A. Yes.

Q. In fact during your investigation you and Detective Estevez learned that the apartment is actually leased in the name of Shazeena West?

A. Yes.

Q. Okay. All right, now you said you went into the apartment with another, there was more officers then just you and Detective Estevez?

A. Yes.

Q. Please tell me the names, I know that you listed a couple of them previously you also had Detective Dinsmore, Mark Dinsmore with you?

A. Correct.

Q. He had entered the apartment as well?

A. Yes.

Q. And what other officers were there?

A. Detective Camp, and there were two uniformed officers, um, Billy Traynor and Kevin Dunn.

Q. And during your particular portion of your investigation that occurred at 308 Woodlawn, all of these officers and detectives are there within the apartment?

A. Either in or on the perimeter of the apartment, yes.

Q. So we're talking about yourself, Detective Estevez, Detective Dinsmore, Detective Camp and then two other officers so I think if I count right that's six or seven officers?

A. Yes.

Q. To come talk to my client, right?

A. Mm-mm.

Q. All right. I want to give the jury an idea of

what the scene is here, okay. This apartment 308 Woodlawn is in the projects, right?

A. Correct.

Q. It's section eight housing for --

A. Correct.

Q. So basically the jurors can get an idea please just give a little description of how big they are so they know how big an area we're talking about and where the apartment is located.

A. Um, Robles Park housing area it is bordered by Jefferson Street to the west, Central Avenue on the east, the southern most street I think is Plymouth I'm not quite sure and then on the northern boundaries you have three or four blocks east and west and then roughly eight blocks north and south. Within that area there is just numerous concrete block apartment buildings with 10 to 15 apartments two story building.

Q. All right, now this particular apartment is two story right?

A. Correct.

Q. Apartment number 308. Who was the first officer that entered into that apartment?

A. I don't know.

Q. Who was the second officer to enter that apartment?

A. I don't recall the order.

Q. What can you tell the jury were you in the middle in terms of entering the apartment? Were you at the end?

A. Um, I was one of the first. Myself, Estevez and Camp would have been one of the first officers in there.

Q. But you don't know if you were the first one?

A. No, I wasn't the first one.

Q. You definitely weren't the first one?

A. No.

Q. But you don't know who the first one was that entered?

A. No.

Q. Did Detective Estevez enter before you?

A. I know he went up the stairs before I did because there were other people in the downstairs living room and I remember making eye contact with some of the officers that had come through the north side rear door. Ultimately I ended up with one of those individuals and then followed up the stairwell.

Q. All right, at the time that you entered into I guess it would be the downstairs portion when you see these other people you're referring in the living room?

A. Correct.

Q. One of those people was Shazeena West, right?

A. Actually she was up at the door when Estevez was first talking with her.

Q. Okay, are we talking about the first floor though?

A. The first floor, yeah.

Q. She's on the first floor.

A. South side front door.

Q. All right. And then there was another couple there as well right, a black older male and a black older female; is that right?

A. I don't know if they were older. I know there were two maybe two other males adults and a female in there.

Q. Okay.

A. Along with Shazeena.

Q. Another girl so there was Shazeena and then another girl that was about Shazeena's age, right?

A. Yeah.

Q. Do you know what her name is?

A. No.

Q. And then we have got there another couple, another couple black male and female couple, right?

A. My recollection is there were two other black males there.

Q. You would agree with me that there was a total of at least four other people?

A. At least four.

Q. Okay.

A. They're all downstairs.

Q. Who were the two black males, what are their names?

A. I knew they weren't Powell. I don't know what their names are.

Q. The bottom line is, Detective, that's what you were concerned about you were looking for Kevin Powell?

A. Correct.

Q. You weren't concerned about who these other people were?

A. Correct.

Q. Now, when you start walking up the stairs to

go to the second level of this apartment number 308, there are -- there is at least one officer ahead of you?

A. Yes.

Q. Okay, and but you don't know how many?

A. I believe it was Estevez and Camp ahead of me when I got into the hallway they were there.

Q. You already told the jury this was the projects but just to make sure this isn't type of apartment that is so large such that you all three could have been walking up the stairs together next to each other?

A. No, it is single file.

Q. We're talking about a very narrow type of stairway going up to the second floor?

A. Yes.

Q. Such that it would be one person at a time basically?

A. Correct.

Q. The visual, let's talk about if you're going up the hallway, I'm sorry, up the stairs you're going to come to a hallway, right?

A. Yes, you go up maybe five or six steps and you turn to the right you get up to the top of the steps and there is a little closet there straight into the bathroom. I believe then you go off to the right and there is another

one or two bedrooms on the north side and then also at the southeast corner bedroom.

Q. Well, right when you get to the top of the stairs there is a room right there that you're facing right, there's a bedroom?

A. I'm not sure if it's a bedroom or bathroom. I thought the bathroom was at the top of the steps. I am know there are two other rooms on the north side as you come up you would keep going north probably have to take a little jog to the right and then you come to the back bedrooms.

Q. So, okay, so we're talking about on the second floor you come up and there's a stairway that leads you to the hall and then at the top of the hall in this hallway on the second floor there are at least you're saying two other bedrooms plus a bathroom, right?

A. Yes.

Q. Okay. Do you remember there being three bedrooms?

A. It could have been three bedrooms. There was only one bedroom that I remember along that southeast corner.

Q. Okay. Just, so the jury can have their directions so they know what we're talking about here, if you're walking up the stairs which direction are you facing, Detective?

A. Initially you're going west and then you make

a right-hand turn and then you're walking north up to the top of the stairwell.

Q. So, if you're walking at the top of the stairwell getting to the hall you're facing north?

A. Yes.

Q. All right.

A. You actually have to turn to the right to go down the hallway.

Q. Okay. So, if you get to the top of the stairs you're facing north if you were to take a right and walk along the hallway you're going to hit two rooms, right?

A. Um, on your right-hand side I think there's only one bedroom and that was the southeast corner bedroom.

Q. Okay. The southeast corner bedroom let's get to that. That's the crucial bedroom, that's where the firearm is, right?

A. Correct.

Q. Now, who was in there before you were in there?

A. Um, Detective Camp was for sure and after Powell was secured, um, myself and Detective Estevez were in there also and I'm not sure in what order who was there first.

Q. Okay.

A. Camp was in there before I was.

Q. Now, you don't actually see Mr. Powell come out of the bedroom, do you?

A. He's being arrested as well kind of right at the threshold of the doorway in the hallway right there.

Q. And when you say arrested he is being handcuffed right there?

A. Right.

Q. These other people that were downstairs had already been cleared, right, from the apartment?

A. Um, I think they were still sitting in the living room.

Q. So before you got there you don't know whether these people that were downstairs these other unknown people you don't know where they were, right?

A. In the apartment, no.

Q. Right, okay. All right, I guess Mr. Powell is handcuffed and at that point he is escorted down the stairs right, out of the way?

A. Yes.

Q. You're not conducting a search while he's standing right there, right?

A. No.

Q. Part of the reason is because it is a pretty small space, right?

A. Well, yeah and just to get him out of the apartment.

Q. Right, you wanted to secure the area and that type of thing proper police procedure I'm sure, right?

A. Yes.

Q. So you did in fact clear him out and then we have at least Detective Camp, Detective Estevez, yourself, and possibly a couple of other officers who are all in this southeast bedroom, am I getting that right, southeast bedroom?

A. Yes, well aside from myself and Estevez and Camp there was no one that went into that room.

Q. Okay. And this search was conducted by all of you?

A. Yes.

Q. Okay. You weren't actually the one that recovered the gun though, right?

A. It was found by Camp.

Q. Okay. And Detective Camp was the one that actually processed that particular evidence?

A. Retrieved it, yes.

Q. And he is the one that would actually have submitted the alleged firearm into property and things of that nature?

A. Um, I'm not sure if he did or if Estevez did it.

Q. Somebody did it but you're not sure who.

A. One of those two.

Q. Okay, it wasn't you?

A. It was not me.

Q. This bedroom, let's talk about the bedroom. Before you get to the southeast bedroom, did you have an opportunity to look at any of the other bedrooms that you were describing that were on the second floor?

A. Um, I did look in on the north side that was just a little bit to the right of the stairwell.

Q. Nothing of consequence was found in there?

A. I was looking for a body.

Q. Right.

A. For an actual search of the room?

Q. Right.

A. Yeah, no, I looked through that room and

there was nobody in there.

Q. Now, when you get to the actual southeast bedroom tell the jury how big a room we're talking about.

A. It's probably maybe 8-foot by 12 no more than 15 feet.

Q. And this particular room had a queen bed in it, right?

A. I don't know. There was a lot of stuff in there.

Q. Well, okay, let's talk about the stuff in the room but let's start with the bed. The bed wasn't -- it is okay if you don't remember the exact size but I guess what I'm talking about are we talking about a single, you know, single bed or are we talking about a larger bed than that?

A. A larger than like a twin size bed it was definitely larger than that.

Q. And you said it had a lot of stuff in there?

A. A lot of stuff in the room.

Q. What kind of stuff are we talking about?

A. There was as you come in the door the bed would be to your left and I believe it was like a pedestal type bed. As you continue into the room off to the right is a dresser that was probably six drawers total, three and three. Along that first wall that you would face

which would be the south side of the apartment there was a taller dresser there with I think a T.V. on top of the cabinet and then as you come in like forward the one side of the bed because it was up against the wall as you walk more eastbound it would lead into a closet.

Q. Okay, and actually this is like an open closet, right, there's not a door on the closet?

A. I can't recall.

Q. It is like would you agree like it's a cement block essentially that's kind of in the wall?

A. It is like an out cove that is blocked out and it is open.

Q. So, there is stuff basically hanging out of the closet everywhere, right?

A. Correct.

Q. In the rest of the room, we're not talking about a neat, all the drawers are closed and everything is put away. We're talking about stuff thrown basically everywhere around this room.

A. Correct.

Q. And again that is an eight by twelve size room?

A. Roughly, yeah.

Q. All right. When you get down to the search at

this point, do you leave the scene then or do you stay at the scene to assist with other, further investigations?

A. After the items were seized out of the bedroom Mr. Powell was put in a marked unit and we followed the marked unit back to 411 North Franklin Street.

Q. Now, at any time during this investigation did you or to your knowledge did any of your other fellow law enforcement officers request that any other tests be run on this particular firearm that you recovered?

A. I don't know what they did.

Q. Okay, but you yourself didn't request any physical tests?

A. No.

Q. For example, you did not request that the firearm be processed for potentially having latent fingerprints on it?

A. Yeah, I don't know.

Q. You didn't do that. All right, and to your knowledge there wasn't a crime scene technician that was requested to this scene to process this scene or the evidence, right?

A. No.

Q. To your knowledge there was never a submission to the Florida Department of Law Enforcement regarding any of the evidence in this case

for further processing or analysis?

A. Well, the gun was sent to FDLE. I don't know what they did with it.

Q. To your knowledge you don't have any knowledge as to any testing that was actually performed on the particular firearm?

A. No.

Q. Now, and you said that you told Ms. Burnett that you actually have some experience in firearms, firearms I think is what you said. I want to just talk about that briefly. You have experience in firearm recognition, right?

A. Correct.

Q. And is this standard at the police academy or is this like special training that you take for this extra classes?

A. Um, it is through the academy.

Q. And is this something that every single law enforcement would go through as well?

A. Well, in your academy training in the weapon section of it you're trained with firearms and you're made knowledgeable of the workings of the gun.

Q. You're taught in different particular types of calibers and things like that?

A. Calibers, yes.

Q. Now, you yourself don't have any particular expertise in that goes beyond firearm recognition however such as ballistics?

A. No.

Q. And in this particular case you didn't yourself do any further testing on the firearm other than to look at it and through your academy training recognize the particular caliber of the firearm, right?

A. Correct.

Q. You can't tell this jury whether or not the actual firearm itself would have been capable of firing anything, right?

A. Correct.

Q. So you -- although you say it's not a toy you really have no way of telling this jury that if it was anything that actually could actually be capable of discharging or anything by the use of an explosive, right?

A. Correct.

Q. In addition to the handgun that was recovered there was also you said ammunition inside the firearm itself?

A. Yes.

Q. It was loaded and there was some additional ammunition as well. Again to the best of your knowledge there was no tests that were conducted regarding the ammunition that was found with the gun?

A. Not that I know of.

Q. The interrogation that occurred after you had arrested Mr. Powell, you said you followed him down to the station house where the interrogation occurs basically, right?

A. Correct.

Q. It is yourself and Detective Estevez that are present?

A. Yes.

Q. And this interrogation actually happened in an interrogation room?

A. Yes.

Q. And please tell the jury how big of a room are we talking about?

A. It's probably about 5-foot long by 4-foot wide. It is very small, three chairs maximum.

Q. And when you're conducting the interrogation this is happening essentially in this room and there is no windows in this room, right?

A. No, ma'am.

Q. One table and two chairs I think you said?

A. Yes.

Q. And the two of you, you and Detective Estevez?

A. Yes.

Q. Along with Mr. Powell. Okay, when you go through your training you also have training and interrogation procedures, right?

A. Correct.

Q. And in fact as a detective you probably have additional training regarding interrogation procedures, right?

A. Well, we have, yeah, had extra.

Q. All right and when in fact when you go into that interrogation the purpose is to get a confession, right?

A. Yes.

Q. In this case that's exactly what you were trying to do when you had Mr. Powell in the interrogation room you were trying to get him to admit to that, that gun was his, right?

A. Um, no, not initially.

Q. The statement that we heard from you, let me

find those statements that we heard from you those statements occurred after Detective Estevez read the warnings the Miranda warnings on that form?

A. Correct.

Q. And the purpose and the nature of those particular Miranda warnings is to make sure that the person being interrogated understands some basic constitutional rights?

A. Yes.

Q. Including primarily the right to remain silent?

A. Yes.

Q. And also the right to have an attorney present during the questioning, during the interrogation, right?

A. Yes, the right to an attorney, yes.

Q. Now in this case you are saying that after Detective Estevez read my client each of these rights that he fully understood these rights and voluntarily chose to make this statement to you?

A. Yes.

Q. Did you have any contact with Shazeena West at all in this case?

A. Other than just at the apartment, no.

Q. All right. Now, when my client makes these

alleged statements first of all I want to ask you about the alleged statement that he purchased the gun off of the street for $150 and I tried to write those statements down as close as I could but I want to make sure that Mr. Powell didn't tell you that he purchased the gun on that date August 10th. He just -- was it a general statement that I had purchased it off of the street for $150 or was it, I purchased this gun today for $150?

A. Oh, no, it was just he had brought the gun for $150.

Q. At some point?

A. At some point, yeah.

Q. And the statement that you said Mr. Powell made that he carried a gun for his protection, that again was that a generalized statement or was that relating to this specific date?

A. Um, that was relating to the specific place where they lived.

Q. Okay. Is there anything -- I didn't hear anything so that's why I'm going over these one by one. Is there anything in these statements that Mr. Powell made that indicated to you that he actually had the firearm in his hand on August 10th, 2004?

A. On that date, no, he didn't say anything about that.

Q. So, that's what I'm getting at. I'm asking about general versus specific, okay, so when he says I carry

the gun for protection he's making that general statement but you have no knowledge as to whether or not he carried a gun on that particular date, right?

A. No.

MS. FREDERIKSEN-CHERRY: One moment, Judge.

THE COURT: Sure.

BY MS. FREDERIKSEN-CHERRY:

Q. The form that Mr. Powell signed you say Detective Estevez has that in his custody?

A. Yes.

Q. Okay, other than that signed form there is no other memorialization of anything that occurred in that interrogation room?

A. No.

Q. For example just so the jury knows what I'm talking about for example my client didn't write a written statement?

A. No.

Q. Although there is a form for a written statement just like that form 310 there is a form for a written statement that he could have written his name his story and signed it, right?

A. Yes.

Q. Okay, but you didn't have him do that in this case, right?

A. No.

Q. The interrogation room no audiotape of what was going on there, right?

A. No.

Q. No videotape either?

A. No.

Q. You're at the police station, right?

A. Yes, he's given the option. He can write out his statement, he can either write out his own statement or he can do an audiotape statement and it was related to us just to write it out.

Q. Okay. Who related that to you?

A. Mr. Powell. He didn't want to go on tape.

Q. When you say write it out you are saying that?

A. He cooperated in the report.

Q. Okay, but he didn't sign anything?

A. Other than the consent form, no.

Q. Okay. I just want to make sure when you say write it out you mean, you mean for the officer such as yourself and other detectives to actually make case notes of what he says so you can testify in court here today?

A. Exactly.

Q. As opposed to a situation where law enforcement could actually write out a statement, right, and or type out a statement and have the person who is making the statement sign it, that didn't happen, right?

A. No, ma'am, we would actually have him if he elected he could write out his own statement.

Q. Right.

A. Or he could, we have tape-recorders. We have them in the room if he had elected to put his statement on tape he could do that. He related to us to write it out meaning for us to write it out.

Q. Now, so the only evidence that we have as to that happened in that interrogation room is coming basically from you and Detective Estevez?

A. Correct.

MS. FREDERIKSEN-CHERRY: No further questions.

THE COURT: Anything further of this witness?

REDIRECT EXAMINATION

BY MS. BURNETT:

Q. The firearm that you saw the nine millimeter that object is designed to expel a projectile?

A. Correct.

Q. And when you were discussing this firearm with the defendant, the defendant knew which firearm you were talking about?

A. Yes, he had seen it in the office. We had brought it up there, that we had gone up there.

MS. BURNETT: I'll pass the witness.

MS. FREDERIKSEN-CHERRY: Nothing further.

THE COURT: This witness be excused?

MS. BURNETT: Yes, Your Honor.

THE COURT: You're excused, sir, thank you. Call your next witness.

MS. BURNETT: May we approach?

THE COURT: Come on up.

(A BENCH CONFERENCE WAS HELD, AS FOLLOWS:)

MS. BURNETT: Could I have five minutes so I can advise Estevez of something that he shouldn't be saying?

(THE BENCH CONFERENCE CONCLUDED.)

THE COURT: Ladies and gentlemen, we're going to take a five minute recess. If you would meet the bailiff outside the courtroom door at two o'clock we'll begin again at two o'clock.)

(THE JURY LEFT THE COURTROOM.)

(COURT RECESSED TO RECONVENE AT 2:00 p.m.)

(COURT WAS BACK IN SESSION.)

THE COURT: Okay. Bring in the jury.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Call your next witness.

MS. BURNETT: The State calls Detective Estevez.

THE COURT: Detective Estevez, if you would step up here and have a seat in the witness chair please, sir.

THE WITNESS: Yes, sir.

THE COURT: Raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, sir.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Randy Estevez, Jr. E-S-T-E-V-E-Z.

THE COURT: YOU may inquire.

WHEREUPON:

RANDY ESTEVEZ

was called as a witness on behalf of the State and, having been first duly sworn and/or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BURNETT:

Q. Detective Estevez, how long have you been employed with the Tampa Police Department?

A. I'm going on my eleventh year.

Q. And, Detective, currently and back on August 10th, 2004, what division in the Tampa Police Department were you assigned to?

A. Criminal investigative division robbery squad.

Q. And on August 10, 2004, did your investigation involve a Kevin Powell lead you to the address of 308 Woodlawn?

A. Yes, ma'am.

Q. And when you arrived there did -- were you also accompanied by a Detective Camp and Detective Augeri?

A. Yes, ma'am.

Q. I'm going to show you what has been premarked as State's Exhibit Number One for identification. Can you tell the jury whether or not you recognize that what's inside State's Exhibit Number One for identification?

A. I do.

Q. How do you recognize it?

A. I recognize the serial number.

Q. And is that in substantially similar condition that it was on the day that you took it into custody on August 10th?

A. Yes, ma'am.

MS. BURNETT: Your Honor, at this time the State would move what has been premarked as State Exhibit Number One for identification purposes into evidence and as State's Exhibit One.

MS. FREDERIKSEN-CHERRY: No objection, Judge.

(STATE'S EXHIBIT NUMBER ONE WAS

RECEIVED IN EVIDENCE.)

THE COURT: It will be so received.

BY MS. BURNETT:

Q. What is State's Exhibit Number One?

A. It is a nine millimeter handgun.

Q. Where did you take custody of that firearm?

A. In the address where we arrested Mr. Powell.

Q. At the time that you took custody of that firearm, did the defendant know that had you found that firearm at that location?

A. I don't believe so.

Q. Okay, then at some point later did he see this firearm?

A. Yes, ma'am.

MS. BURNETT: May I publish it to the jury?

THE COURT: Sure.

BY MS. BURNETT:

Q. I see as part of it there is a clip, was there any ammunition recovered as well?

A. Yes, ma'am.

Q. I'm going to show you what has been premarked as State's Exhibit Number Three for identification. Please take a look inside the bag and tell the jury whether you recognize its contents.

A. Yes, ma'am.

Q. And are they in substantially or similar condition that it was on the day you located the firearm as well as the ammunition?

A. Yes, ma'am.

MS. BURNETT: Your Honor, at this time the State would move what has been premarked as State's Exhibit Number Three for identification into evidence as State's Exhibit Number Three.

THE COURT: Any objection?

MS. FREDERIKSEN-CHERRY: No objection.

THE COURT: So received

(STATE'S EXHIBIT NUMBER THREE WAS RECEIVED IN EVIDENCE.).

BY MS. BURNETT:

Q. Now, as part of your training as a law enforcement officer do you recognize that there -- that is in fact a firearm?

A. Yes, ma'am.

Q. And is this the type of firearm designed to expel a projectile?

A. Yes, ma'am.

Q. Now, after you recovered this firearm, did you also call a crime scene technician to the location at 308 Woodlawn?

A. They were called to our squad room. We had left the residence and we turned it over to the crime scene tech.

Q. And were there any fingerprints lifted from that firearm?

A. No, they were attempted to but none was recovered.

MS. FREDERIKSEN-CHERRY: Judge, I could not hear his response.

THE COURT: Could you repeat the response?

THE WITNESS: They were attempted but none were recovered.

BY MS. BURNETT:

Q. And at the time that you came back to your offices I guess at Franklin Street?

A. Yes.

Q. And you at that time were able to interview

the defendant; is that correct?

A. Yes, ma'am.

Q. And at that time you presented him with the consent to be interviewed form; is that correct?

A. Correct.

Q. I'm going to show you what has been also premarked as State's Exhibit Number Two for identification. Would you please tell the jury whether or not you recognize this?

A. I do.

Q. What is that?

A. That is Tampa police Department consent and release form and the portion used is the consent to be interviewed incorporating an offense.

Q. And did the defendant sign this form?

A. Yes, he did.

Q. Did you witness him signing this form?

A. Yes, that was after we went line by line sentence by sentence through the Miranda warnings.

Q. And did you read the defendant the Miranda warnings that are written right there on that piece of paper?

A. I did.

Q. And did he consent to be interviewed?

A. Yes, he did.

MS. BURNETT: At this point the State would move what has been premarked as State's Exhibit Number Two for identification purposes into evidence as State's Exhibit Number Two.

THE COURT: Any objection?

MS. FREDERIKSEN-CHERRY: Judge, I'm renewing my prior objection at this point.

THE COURT: Overruled.

(STATE'S EXHIBIT NUMBER TWO WAS RECEIVED IN EVIDENCE.)

BY MS. BURNETT:

Q. Was the firearm with, you at that point?

A. Yes, ma'am.

Q. And at that time you were interviewing the defendant about this firearm you had the firearm in your possession?

A. Yes, ma'am.

Q. So, there was nothing obstructing his ability to see the firearm in which you were talking about?

A. It was shown to him.

Q. At that time what statement did he make to you post Miranda about this firearm?

MS. FREDERIKSEN-CHERRY: Judge, I'm renewing my prior objection to this line of questioning.

THE COURT: I'll overrule the objection.

A. Um, after the Miranda warnings Mr. Powell told us that he had purchased the gun on the street for $150 and he always carried it for protection.

Q. This was the gun that was found in the bedroom that the defendant was seen exiting; is that correct?

A. Correct.

MS BURNETT: No further questions. I'll pass the witness.

THE COURT: Any questions?

MS. FREDERIKSEN-CHERRY: I don't have any further questions of this witness.

THE COURT: All right, you may step down. Call your next witness.

MS. BURNETT: One moment, Your Honor. Your Honor, the State announces rest.

THE COURT: All right. You all want to

approach?

MS. FREDERIKSEN-CHERRY: We're going to go ahead and make a judgment of acquital argument based on the fact that according to the definition there needs to be an articulable distinction and the officers testified in their opinions that they did not know that it was designed to expel a projectile and there was no one from FDLE qualified to make that determination.

THE COURT: I don't think that they need to bring in an expert to prove that term what a firearm is. I mean they were here in court. Officers testified who are familiar with firearms and they know firearms and they recovered ammunition so your motion is denied at this time.

MS. FREDERIKSEN-CHERRY: Okay. I would renew all my prior objections.

THE COURT: Okay, are you going --

MS. FREDERIKSEN-CHERRY: If I could just have a chance to talk to him.

THE COURT: Okay.

(THE BENCH CONFERENCE CONCLUDED.)

THE COURT: Mr. Bailiff, if you would take the jury into the jury room.

(THE JURY LEFT THE COURTROOM.)

(THE DEFENDANT CONFERRED WITH

COUNSEL PRIVATELY.)

MS. FREDERIKSEN-CHERRY: Judge, I am going to call my client to the stand next if you would like to inquire.

THE COURT: All right, raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes.

THE. COURT: Put your hand down and state your name for the record.

THE DEFENDANT: Kevin Dewayne Powell.

THE COURT: Mr. Powell, are you going to testify, sir?

THE DEFENDANT: Yes.

THE COURT: You are?

THE DEFENDANT: Yes.

THE COURT: Have you had an opportunity to discuss that with your attorney?

THE DEFENDANT: Yes.

THE COURT: You know that no one can make you get on that stand and testify.

THE DEFENDANT: Yes.

THE COURT: That's entirely a decision for you and for you alone. Have you had an opportunity to discuss that with your attorney?

THE DEFENDANT: Yes.

THE COURT: And it's your decision to testify?

THE DEFENDANT: Yes, sir.

THE COURT: After consultation with your attorney?

THE DEFENDANT: Yes.

THE COURT: Okay. How many prior felonies are we talking about?

MS. FREDERIKSEN-CHERRY: Um, we have ten prior felonies convictions and one prior conviction involving dishonesty.

THE COURT: Sir, and you aware that the State or your attorney or I know the State is probably going to bring out the fact you have been convicted ten prior times?

THE DEFENDANT: Yes.

THE COURT: And you still wish to testify?

THE DEFENDANT: Yes.

THE COURT: All right. Bring in the jury.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Ms. Frederiksen-Cherry?

MS. FREDERIKSEN-CHERRY: Defense calls Kevin Powell.

THE COURT: Mr. Powell, if you would step over here to the witness chair please, sir. You can go ahead and have a seat, sir. Raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes.

THE COURT: You can put your hand down. If you would state your name for the record and spell your last name.

THE DEFENDANT: Kevin Dewayne Powell, P-O-W-E-L-L.

THE COURT: Please be sure to speak up nice and loud, Mr. Powell, so everybody can hear you. Ms. Frederiksen-Cherry, you may inquire.

BY MS. FREDERIKSEN-CHERRY:

Q. Mr. Powell, please tell the jury whether in fact you did come into law enforcement on the date in question that being August 10th, 2004?

A. Yes.

Q. And the address that we're referring to which is that the Woodlawn address I believe, is that the location where you came into contact with law enforcement on that day?

A. Yes.

Q. Okay, now eventually at some point we know you were arrested on that date right, Mr. Powell?

A. Yes.

Q. And I want for you to basically explain to the jury what happened prior to your arrest when law enforcement came to the residence there at 308 Woodlawn okay? First, please tell the jury how it was that you became aware that they were actually inside the apartment?

A. Um, it was a bunch of rumbling. I was -- I was, um, I was -- there was a bunch of yelling saying they were entering the apartment.

Q. Okay, I'm going to need you to speak up, Mr. Powell, because I am having a little bit of trouble hearing you, okay, you heard something?

A. Yes, I heard yelling at the bottom of the stairs.

Q. All right, so you were in fact upstairs?

A. Yes, I was.

Q. All right. Now, Detective Augeri described for this jury the kind of layout of the apartment, all right. You are familiar with this apartment, right?

A. Yes.

Q. Now, on the date in question August 10th, 2004, did you live at that apartment?

A. No.

Q. Did you know anyone that did live in that apartment?

A. Yes.

Q. And who was that person?

A. Ms. West.

Q. You're referring to Shazeena West?

A. Yes.

Q. Now, the upstairs of this apartment you heard Detective Augeri's layout, his description of the layout of the apartment. Does that seem accurate to you or do you see the layout a little bit different?

A. I see it a little bit different.

Q. Let's do this. Let's have you give a description, first of all let's start with you're walking up the stairs that goes from the first floor to the second floor. If you're walking up those stairs are you -- do you agree that you

are facing north once you get to the top of the stairs?

A. Yes, I can't like determine terminology but yes, north straight ahead.

Q. All right. And do you agree that it empties into a hallway when you get to the top of the stairs?

A. Yes, the hallway starts from right I mean when you turn to the right.

Q. And what is the first thing you see when you get to the top of the stairs in the hallway?

A. A bedroom.

Q. And if you were to go along that same wall what else is down there if anything?

A. The bathroom.

Q. All right, sir, now the wall that is opposite of that, that would be the wall that's closest to where you are entering up coming the stairs, right, so if you turn right that's going to be hallway on your right-hand side. Tell the jury what is on that side of the hallway as you're coming back from the stairway?

A. There's another bedroom and the far bedroom on the end.

Q. Now but you didn't live there at the time but you know what this layout looks like, right, you have been inside there?

A. Yes.

Q. When you heard a commotion downstairs was there anybody upstairs with you?

A. Yes.

Q. And how many people if you know were in the upstairs portion of this apartment?

A. Woman and a man, two.

Q. Two?

A. Yes.

Q. Did at some point you see law enforcement coming up the stairs?

A. Um, no ma'am.

Q. When -- when you heard the commotion what did you do?

A. I ran to see what was going on.

Q. And where did you run to?

A. To the beginning of the stairs.

Q. Where were you originally?

A. At the top of the stairs.

Q. And so you run just a few steps basically?

A. Just a few steps.

Q. So you're looking down?

A. No, this was right there like right at the corner where you couldn't turn left and at the beginning like they wasn't, they wasn't even out of the steps, you know, up the stairway, okay, you come upstairs and you step into the hallway and that's where they were.

Q. Okay, all right. Now the first time that you see law enforcement is when you get to this portion of the stairs?

A. Yeah, at the top of the stairs.

Q. And how many law enforcement officers are we talking about, Mr. Powell?

A. Um, there was two at the top and several behind.

Q. So when you kind of turn around the corner and are looking down the stairs essentially you're seeing a stream of law enforcement officers coming towards you basically?

A. Yes, ma'am.

Q. All right. At this point to be clear, okay, are you at the southeast bedroom like Detective Augeri claimed that you were?

A. No.

Q. You are actually at the opposite side of the -- you're not at the side that the bedroom is you're at the completely opposite side is that what you're telling the jury?

A. Yes, ma'am, I'm at the beginning of the hallway.

Q. Now, these other two people that were up the stairs, do you know where they were before all that happened?

A. There was a room that, that is directly north of the stairway. You can look straight like there's like a little maybe a wall piece like, like kind of off the center from the stair like you can see it is like straight, how do you describe it to the room.

Q. So if you are to walk straight as you get to the top of the stairs instead of turning you would walk directly into this room?

A. Pretty much.

Q. And that's where those two people were?

A. Yes.

Q. And once you turned around the corner and you see this stream of law enforcement officers coming at, up towards you where are these other two people, are they still in the room?

A. They had been continuing trying to get them out of the room.

Q. Tell the jury about that. What did you see when you first got there?

A. When I first got to the end of the stairs they were pulling the woman and the man up out of the room.

Q. Okay. And you were able to see this?

A. Yes.

Q. We're talking about completely the opposite end of the hallway, the room you came from that's the southeast bedroom and the room where the, this other couple was is in the opposite end of the apartment, right?

A. Yes.

Q. You were able to see that before law enforcement actually got to you?

A. Yes.

Q. When you say they were pulling them up out of the room what if anything did they do with this couple after that?

A. They directed them straight down the stairs.

Q. Did it seem to you like that they were trying to get these people out of the way?

A. Yes.

Q. And what if anything did you say to law enforcement or anybody else for that matter when you came upon this site?

A. I asked them what was going on.

Q. And what happened?

A. They arrested me.

Q. Now, when they -- when you say they arrested you to be specific at that point were you actually physically handcuffed and taken into custody?

A. Yes.

Q. Where was that location?

A. At the top of the stairs.

Q. Not at the southeast bedroom?

A. No.

Q. Not inside the bedroom?

A. No.

Q. Not at the threshold of the door?

A. No.

Q. When you were handcuffed what did you -- what happened to you next where did the law enforcement officers take you?

A. They took me down the stairs and placed me inside a police car.

Q. And that was just right outside of the apartment there?

A. Yes.

Q. At some later point in time you heard the testimony, Mr. Powell, officers recover a firearm?

A. Yes.

Q. That's this firearm that's over here in evidence. Once you were in custody in the police car, Mr. Powell, how long did you sit there before you were transported to the station downtown at 411 Franklin?

A. Maybe about 15, 20 minutes.

Q. You see anything going on at this time in and out of the apartment?

A. No, they're all outside of the apartment. It was a few officers still on the outside but they was inside the apartment.

Q. And when you eventually after that 15 approximately 15 minutes when you are eventually transported down to the station house downtown do you in fact end up in an interrogation room with Detective Augeri and Detective Estavez as they stated?

A. Yes.

Q. Now, I want to talk to you about the interview okay, but before we get to that, can you take a look at this exhibit, okay. Can you see in there?

A. Yes.

Q. I'll leave it in the box here but this is I believe State's Number One. State's Exhibit Number One, Mr. Powell, the firearm alleged firearm that has been introduced into evidence at some point these officers presented you or showed you this gun, right?

A. Yes.

Q. And when was that, was that at the station house or at the apartment?

A. It was at the station.

Q. And when you are at this station house is this while you were already in the interrogation room?

A. Yes.

Q. All right, before we get to the statement that were made at the interview Mr. Powell, tell the jury whether before you saw this gun at the station house, okay, did you have any knowledge that this gun was present underneath that bed at 308 Woodlawn?

A. No.

Q. You do stay there at that address every once in a while, right?

A. Yes.

Q. Okay. This particular gun however you had no knowledge of it before August 10th, 2004?

A. No.

MS. FREDERIKSEN-CHERRY: All right. You get to the station house let's talk about this consent to be interviewed form. This is State's Exhibit Number Two. May I approach the witness?

THE COURT: Sure.

BY MS. FREDERIKSEN-CHERRY:

Q. Um, I want you to take a look at this form, Mr. Powell. This is the form that Detective Estavez read to you, correct?

A. Yes.

Q. And the way the language is on there I want you to take a look at it. Does that look like the form that you signed?

A. Yes.

Q. To be interviewed and look at the bottom is that your signature, sir?

A. Yes.

Q. So, you're telling the jury that you did in fact sign this waiver of your rights?

A. Yes.

Q. You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?

A. Yes.

Q. You waived your right to remain silent and not make any statements that could be used against you in a court of law like they're being used against you today, right, that's what this form is, right?

A. Yes.

Q. And when you signed this form you did in fact make some statements?

A. Yes.

Q. And in fact you made the statements that Detective Augeri and Detective Estevez said that you made, didn't you?

A. Yes.

Q. Now, explain to the jury why and first of all were those statements that you made on that night to Detective Augeri and Detective Estevez were those statements true?

A. No.

Q. Let's go through them one by one. You told them that you owned that gun?

A. Yes.

Q. Your gun?

A. Yes.

Q. You told them that, right?

A. Yes.

Q. You told them that you brought it off the streets for $150?

A. Yes.

Q. You told them that you used it for your protection?

A. Yes

Q. You're telling this jury now those statements are true?

A. No.

Q. Please explain why to this jury you would sign this consent form admitting that this is and make statements to these detectives that this is your gun if in fact that statement was not true?

A. Because of the threat they proceeded after my friend, girlfriend that they were going to try to charge her with the charge of possession of a firearm and take away her kids and --

Q. Let me back up. You say there is some kind of threat?

A. Yes.

Q. Tell the jury specifically what was said to you.

A. The detectives told me that my, my girlfriend would be charged with the possession of a firearm and that they would call the DCF to get her children take away and that they would because of the form of housing get her took off the housing.

Q. Your girlfriend is who on the date of the offense?

A. Shazeena West.

Q. Shazeena West. And did you have reason to believe that in fact your girlfriend would be charged with possession of this particular gun if you didn't basically take the rap for it?

A. That's correct, that's how they made me feel.

Q. When were these statements made to you?

A. In the interrogation room.

Q. Is that the six by, five by four foot room that Detective Augeri was referring to?

A. Yes.

Q. And describe that room for the jury.

A. Um, it was like, it was big enough for like three school desks. I was sitting here and Mr. Estevez was facing my side and Mr -- I forgot the first detective's name.

Q. Augeri.

A. Yes, but he was facing me and the doorway is like not exactly in front of me but off to the left.

Q. Okay. How long did you sit in that interrogation room before you were actually questioned?

A. Um, I was questioned immediately.

Q. Okay, and so immediately from getting out of the car these two detectives in this 5-foot by four foot room with you questioning you?

A. Yes.

Q. Okay, to the best you can remember if you could use the specific language that you recall that was used. Do you know what that is, Mr. Powell?

A. I don't understand.

Q. Well, you're saying that there was essentially a threat made to you that you either fess up to this you own up to this not fess up but you own up to this take the rap for this gun or otherwise they'll put it on your girlfriend, right?

A. Yes.

Q. Well, please to the best you can remember tell the jury the specific language that you remember hearing.

A. If -- if -- if the gun is not yours we're going to put it on your girlfriend and -- and they was saying that they would take her children and, um, get her kicked out of the housing.

Q. Well, let's talk about the housing because this is -- you were aware she lives in the projects, right?

A. Yes.

Q. Obviously, okay. For those of us that don't know, section eight housing is essentially government subsidized housing, right?

A. Yes.

Q. Did you know this before August 10th, 2004?

A. Yes.

Q. And were you aware that should the person on the lease of section eight housing apartment be arrested that they in fact they would be, that would result in them losing their housing?

A. Yes.

Q. And is that something you were taking into consideration when you were told that, that might be the result of you not taking the rap for this gun?

A. Yes.

Q. Now, the other thing that addressed was her children Ms. West's children.

A. Yes.

Q. Were you aware first of all that she had children during this interview?

A. Yes.

Q. How many?

A. Three.

Q. How old?

A. One is three, one is 11 and one is 12. The two older ones are no more than a year or two apart.

Q. And do they live with Ms. West in the apartment that we're talking about?

A. Yes.

Q. What room or rooms do they live in this apartment? S

A. When you go up the flight of stairs facing the north you would make a right turn into the hallway and maybe, maybe three to four steps no more than five their room is to the right.

Q. Okay.

A. The first room to the right.

Q. And DCF what do you understand those letters to mean?

A. Department of Children and Family.

Q. What did you understand that agencies responsibilities as being on this date?

A. To make sure the parents to take care of your children.

Q. So did you believe that if Ms. West had been charged with the ownership or possession of this fircarm that she would have realistically lost her kids to DCF they would have been removed from her home?

A. Yes.

Q. Other than that reason, okay, taking the rap for your girlfriend, Mr. Powell, was there any other reason why you made the statements that this gun was yours?

A. No.

Q. Now, Mr. Powell, you have a criminal history?

A. Yes.

Q. Don't you?

A. Yes.

Q. In fact you have been convicted of a felony before?

A. Yes.

Q. Before August 10th, 2004, in fact how many times have you been convicted of a felony?

A. Ten.

Q. All right. Now, have you ever been convicted of a crime involving dishonesty as well?

A. Yes, false name.

Q. How many times?

A. One.

Q. One. Are you telling the jury here today, Mr. Powell, the truth as you swore to do?

A. Yes.

MS. FREDERIKSEN-CHERRY: No further questions.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MS. BURNETT:

Q. So this -- these requirements in this section eight housing, you can't be a convicted felon and get

section eight housing; is that correct?

A. Yes.

Q. So Shazeena West was not a convicted felon?

A. No, I really wouldn't know. I never checked her rap sheet or anything. We never talked about those things.

Q. She has the lease in her name, right?

A. Yes.

Q. So if she has a lease in her name and so she is not a convicted felon.

A. I would assume not because you can't be on housing being a convicted felon.

Q. So there is no law that says that she can't own a firearm, is there?

MS. FREDERIKSEN-CHERRY: Judge, it's speculation.

THE COURT: I'll overrule the objection.

BY MS. BURNETT:

Q. She's not a convicted felon why can't she own a firearm?

A. I don't know why. There is no reason why she couldn't.

Q. Well, in fact she can own a firearm. She's just like any other person that has their civil rights and can buy and possess a firearm, right?

A. Yes.

Q. And are any of her kids your kids?

A. No, I don't have any kids.

Q. And you stay there, don't you?

A. No.

Q. You don't ever sleep in that apartment over night?

A. I sleep over there maybe once or twice during the week.

Q. She is your girlfriend?

A. She is my girlfriend.

Q. So who were the other two older people that were upstairs when law enforcement got there?

A. Her aunt and her uncle.

Q. And law enforcement when they were downstairs announcing they were asking for you, weren't they? Weren't they saying Kevin Powell, come out?

A. I don't know. I just heard a lot of noise going

on, a lot of commotion and I came to see what was going on.

Q. And this is a small apartment, right?

A. Yes, upstairs and downstairs.

Q. They're downstairs and you're just right there in the doorway and you don't hear them screaming for you no one else but screaming for you?

A. No, I didn't hear. All I heard was a lot of noise. I can't determine whether they saying my name or not.

Q. In fact your girlfriend Shazeena told them that you weren't even in that apartment?

MS. FREDERIKSEN-CHERRY: Objection, speculation and also calls for hearsay.

THE COURT: I'll sustain the Objection.

BY MS. BURNETT:

Q. But you didn't come down the stairs right away and say hey, guys, here I am, did you?

A. No, because I didn't know what they were saying.

Q. With all that commotion, with that commotion announcing that they were law enforcement you didn't know they were there?

A. Once I heard the commotion then I came out to

was going on. I didn't know who it was.

Q. And how big is this place?

A. Upstairs and downstairs.

Q. And when you came out what room were you in?

A. Um, what do you mean? I don't understand the question.

Q. What room were you in upstairs when you said you came out?

A. In Ms. West's room.

Q. And that's also your room that's where you sleep when you are there; is that right?

A. Yes, if I spend the night, yes.

Q. When did you arrive at that apartment? When was the last time you got there?

A. On that day on August 10th.

Q. August 10th you went to that apartment?

A. Yes.

Q. Where did you come from?

A. I stay mostly at 8427 North 37th Street.

Q. You left there and you went to her apartment?

A. Yes.

Q. And you stated here that on August the 10th you told law enforcement that it was your gun and you brought it on the street for $150 and you never left home without it and you used it for protection you took it wherever you went?

A. Yes.

Q. You told them that?

A. Yes.

Q. You're telling the jury today that you lied to law enforcement on that day?

A. Yes.

Q. Because they were threatening about your girlfriend being arrested for nothing else but for possession of this firearm; is that right?

A. Yes.

Q. Where were the kids?

A. Um, they were in the school.

Q. Where was the three year old?

A. Um, he probably was downstairs. He wasn't -- he wasn't with me at this time. He was there when I

arrived that day.

Q. How long had you been there?

A. On August the 10th?

Q. Mm-mm, yes.

A. After a job interview my belt popped on my car.

Q. How long had you been there?

A. Um, maybe about an hour or two.

MS. BURNETT: No further questions.

THE COURT: Any further questions?

MS. FREDERIKSEN-CHERRY: Briefly, Judge.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. FREDERIKSEN-CHERRY:

Q. You didn't stay with Ms. West every night during this time, did you?

A. No.

Q. And in fact I mean to your knowledge you don't know if she is not seeing anybody else, right?

A. No.

Q. She could be?

A. She could be.

Q. All right, and so you're not there all the time to witness who is coming in and out of that apartment basically?

A. No.

Q. When you were there for that one to two hours on August 10th, 2004, you told Ms. Burnett that you were in the room, okay? My question to you was the room messy like Detective Augeri said it was?

A. Yes.

Q. Did you have any reason to believe that there might be a weapon inside her room?

A. No.

Q. And did you at any point have any reason to check underneath the bed to see if there was anything under there?

A. No.

Q. When the detectives told you that they were going to put this gun -- they were going to put this gun on your girlfriend Ms. West, okay, what was going through your mind? I mean did you think she really could get arrested for something, some type of criminal

charge?

A. Yes.

Q. Okay, I mean I guess what I'm asking is Ms. Burnett was asking you did you think in your mind she was a convicted felon she couldn't own a gun, you know, was that thought process even going through your mind or were you just thinking she's going to get arrested or she's not going to get arrested if I --

MS. BURNETT: Objection, leading her witness.

THE COURT: Don't lead your witness.

BY MS. FREDERIKSEN-CHERRY:

Q. What is going through your mind, Mr. Powell?

A. She was going to get arrested.

Q. And even though you can't articulate what criminal charge you thought she. might get arrested for?

A. Yes.

Q. You still believed that the threat was real that she .was going to get arrested for something doing something wrong?

A. Yes.

MS. FREDERIKSEN-CHERRY: No further questions.

THE COURT: All right, thank you, sir. You may step down. Any further witnesses?

MS. FREDERIKSEN-CHERRY: No, Your Honor.

THE COURT: Defense rests. Yes?

MS. BURNETT: The State would recall Detective Estevez.

THE COURT: Detective Estevez. If you would step back up here and have a seat in the witness chair, please. I would remind you that you're still under oath, Detective.

THE WITNESS: Yes, sir.

THE COURT: You may inquire.

WHEREUPON:

RANDY ESTEVEZ

was called as a witness on behalf of the State and, having been previously sworn and/or affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BURNETT:

Q. Detective Estevez?

A. Yes, ma'am.

Q. On August the 10th, 2004 prior to your interview with the defendant, did you ever at any time make any threats to him about what you could do to Shazeena West?

A. No, ma'am, I don't follow that question but no, I never threatened.

Q. Did you ever tell him that if he didn't confess that you would charge her and call DCF and take away her kids?

A. No.

MS. BURNETT: No further questions.

THE COURT: Any questions?

MS. FREDERIKSEN-CHERRY: Nothing, Judge.

THE COURT: I'm sorry?

MS. FREDERIKSEN-CHERRY: No questions.

THE COURT: Thank you, you may step down. Any further witnesses?

MS. FREDERIKSEN-CHERRY: Not from defense, Judge.

THE COURT: All right, ladies and gentlemen, we're going to take a 10 minute recess before we begin closings and instructions so if you would meet the bailiff outside the courtroom door about five minutes to three we'll begin again at five minutes to three.

(THE JURY LEFT THE COURTROOM.)

THE COURT: All right.

MS. FREDERIKSEN-CHERRY: I would renew all my prior motions and objections.

THE COURT: Same rulings. How long do you all need for closings?

MS. BURNETT: Fifteen.

MS. FREDERIKSEN-CHERRY: Fifteen.

THE COURT: Fifteen, okay. How do you want to divide yours?

MS. FREDERIKSEN-CHERRY: Ten and five.

THE COURT: You want me to let you know when you've done about eight?

MS. FREDERIKSEN-CHERRY: Yes, please.

THE COURT: Okay. Oh, the jury instructions let's go through those real quick. I'm going to give 3.1 the introduction to the final instructions, 3.2 the statement of the charge, 10.15 felon in possession of a firearm, 3.7, plea of not guilty, reasonable doubt, burden of proof, weighing the evidence and it looks like we can get rid of six, seven and ten.

MS. FREDERIKSEN-CHERRY: Well, Judge, I'm asking for seven.

THE COURT: That's part of the instructions I can give you seven I don't mind. I'll give you seven.

MS. FREDERIKSEN-CHERRY: Okay.

THE COURT: Okay, take out six and ten. We don't have any expert witnesses. We have got the defendant testifying. We have some rules for deliberation 3.10, 3.11 the cautionary, 3.12 the introduction to the verdict form, the verdict, submitting the case to the jury. You didn't give me a lesser included -- never mind it is here never mind, okay. All right, I'll see you at five minutes till.

(COURT RECESSED TO RECONVENE AT 2:55 p.m.)

(COURT WAS BACK IN SESSION.)

MS. FREDERIKSEN-CHERRY: Judge, we have one issue before we start.

THE COURT: What?

MS. FREDERIKSEN-CHERRY: On 3.9(e) defendant's statements was not included in the jury instructions.

MS. BURNETT: I can pull it out of this morning's jury instructions if you want.

THE COURT: Yeah, give me that one because we're going to go. Yeah, go ahead and bring them in.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Ladies and gentlemen, both the state and the defense have now rested their cases.

The attorneys will now present their final arguments. Please remember that what the attorneys say is not evidence however; do listen closely. Their arguments are intended to aid you in understanding this case.

Each side will have equal time but the defense is entitled to divide that time between an opening argument and a rebuttal argument after the State has spoken. Ms. Frederiksen-Cherry?

MS. FREDERIKSEN-CHERRY: Thank you. May it please the Court, counselor, members of the jury.

Mr. Powell is not guilty of felon in possession of a firearm and again the only issue really that we're asking you all to decide for us today is whether or not he was in possession of a firearm that's it, okay.

The issue of whether or not he is a convicted felon we concede that so we don't need to go over that particular issue.

So that leaves us with the question of whether you believe each one of you beyond a reasonable doubt okay, that the state has proven its case like we discussed in jury selection and in this particular case they haven't.

There is a reasonable doubt at least one, okay and I'm going to take my time with you right now to go over a couple of doubts that I seen arise out of the

case.

Now, remember if you find any reasonable doubt as to whether this element has been proven your verdict should be not guilty.

All right, let's start with what happened here on the date of August 10th, 2004, we are talking about this apartment in the projects 308 Woodlawn Avenue.

I think everyone had got a pretty good feeling of what this apartment looked like through the description of all of the witnesses everyone pretty much agreed on the fact that yes, this is a small apartment a two story apartment in section eight housing in the projects in Tampa, all right.

So keep that in mind and the reason that I asked that the witnesses describe this scene to you is so that you can understand what reasonably happened here because when we're talking about an amount of at least six, at least six law enforcement officers entering this apartment, okay, picture what really is going on here okay.

I mean we're talking about going up an empty stairway where only one person can get through at a time, all right?

So picture that when we're talking about knowledge, okay, did my client know that gun was underneath the bed, okay, and he's telling us he didn't know, all right, so let's think about what really happened here.

He says he's here to find Mr. Powell. That's the bottom line. That's what Detective Augeri told you. There's no question that they came there to seek him out specifically but you know what, there were other people that were there.

First of all it's not his place. That's not where he calls home. That's not the address he calls home.

He goes over there because his girlfriend lives over there and is he over there every once in a while, yes. we concede that. He's told you that Mr. Powell got up on the stand and told you that.

The issue is okay because he sleeps in that bed every once in a while with his girlfriend, okay, does he therefore know that the gun was there underneath the bed all right. He got up here on the stand and we went over this in great detail yesterday during jury selection that he certainly does not have to get up there and tell you anything, all right. But he wanted to.

He decided to waive his constitutional right to remain silent and to tell you all why it was that he made these statements allegedly he made these statements.

Well, he made these statements we concede that. He told you he made these statements but why he would make these statements admitting ownership and knowledge to this gun that is before you all today when in fact he had no idea that the gun was there. He had no idea that gun was there on August the 10th.

Now, when you're deciding what is reasonable

okay which is really what this comes down to let's think about the testimony that you heard and there are conflicts, okay?

We're not going to go -- the reason that I think it's important that we look at the scene and the layout is because when you're thinking about these witnesses, the state's witness' ability to give you the details and recount of what happened, all right, remember we're talking about a pretty chaotic scene.

We're talking about a small apartment with one law enforcement after the other going up this small area with at least four other individuals in the house other than Kevin Powell are in the apartment we're talking about six law enforcement officers plus four additional other people, we're talking about ten people in a very small space, okay, and things are happening quickly.

These cops are looking for Kevin Powell and there's other people in the way. They're getting them out of the way. They're not the person they want, get them out of the way, next, next room basically is what is going on here okay.

And what does Kevin Powell hear? He hears commotion something is wrong. What is going on? He doesn't know there are cops down the stairs, all right so he goes to look.

Guess what? When he turns the corner he sees a stream of law enforcement officers coming up the stairs. They cuff him and they take him outside.

He tells you he's been there for an hour to two

hours and has no idea, he has no reason to look under the bed, okay? Why would he have any reason in the middle of the day any reason to look under Shazeena West's bed, okay. It is not his bed.

He had no cause, okay, to look under there to check to see if it was there. He had no knowledge that it was there. Then you have after the fact, okay, you need to also look at the fact that the only thing, the only thing that puts this gun, okay, within any type of knowledge, any type of knowledge that my client has of this gun comes from these statements that he made. That's it, ladies and gentlemen.

It is not in his hand. There is nothing, there is no evidence before you to put this gun in his hand, okay? Even if you believe that those statements that my client allegedly made were voluntarily and even if you believe those statements to be true, those statements do not put that gun in my client's hand. It is still under the bed, okay, and even Detective Augeri told you that he cannot tell you through the statements that my client made that he admitted to having the gun in his hand on August 10th and that's important.

This distinction is extremely important because I believe His Honor will instruct you that in order to have possession of a gun there's two types of possession.

There is actual possession and there is constructive possession and let me just make sure I get the words exactly right here because this is extremely key in this case.

I believe that His Honor will instruct you that to

possess in general essentially means to have personal charge of or exercise the right of ownership, management or control over the thing possessed, okay, and then it breaks it down to actual versus constructive possession.

If a thing is in the hand of or on the person or is so close as to be within ready reach and is under the control of the person it is in the actual possession of that person, okay.

And if it is in a place over which the person has control or which the person has hidden or concealed it then it is in the constructive possession of that person.

All right, this gun even if you believe all those statements that were made to be true and voluntarily made, okay, still results with a constructive possession case. There is no evidence before you at all to support actually possessing a firearm.

All right, I want to talk about what happened when he gets downtown, all right. He gets downtown and essentially the state's entire case is resting on my client's admission because we still don't know who these other people are. The only person who can tell you who all of these other people were in the apartment are my client, okay. Detective Augeri doesn't know who the two other, he says black males who are in the house. He can't tell you who the other girlfriend was. The only other person that he knows was in the house other than Kevin Powell is Shazeena West, all right. Remember she's -- she's the one who lives in the bedroom where the gun was found. Okay, not my client. He's there every once in a while but she's the one who lives there, okay?

None of these other people, all right, are even identified much less questioned about this firearm, okay? Is that a reasonable doubt? Absolutely, absolutely that's a reasonable doubt.

So what is the state resting their case on because there's nothing else, okay? There are no print analysis for you to have before you to tie my client to actually put his hands on the gun, okay, we know that. We can all agree on that.

There is no other testing that was conducted. No physical ties that might let you all know as the jury that Mr. Powell had this gun in his hand so what do they rest their case on? They rest their case on Mr. Powell's statements.

Now, is it reasonable to believe that what Mr. Powell is saying occurred, okay, absolutely.

Think about the situation. Now, these detectives know Ms. West. They put her at the scene, okay. They know her. They know they're going to a location that is in the projects that is in section eight.

They know she has children because by Mr. Powell's description they would have had to go by the children's room in order to get to where they say he was. So the basis, there are certainly things that are within the detective's knowledge, okay. These aren't things that are so out of rehelm to be not reasonable, okay. Think about it.

Is it reasonable to think that his scenario could have occurred. This -- the manner that he told you

occurred, actually occurred because he told you the truth, okay.

Ms. Burnett is going to say well, he's a ten time convicted felon. That's not what we're here for, ladies and gentlemen. That doesn't mean he's guilty of this offense and that's why I asked you all specifically in jury selection whether you could get by the fact that he is a convicted felon, okay. He is telling you the truth here today, all right.

Now, when you are considering the weight of the statements because I submit to you that's all the state has here to tie this gun to my client please consider this instruction that I believe His Honor will read to you as well regarding the defendant's statement.

Any time you have a statement from a person who is accused of a very serious crime, okay, the statement should always be considered with caution and weighed with great care to make sure it was freely and voluntarily made.

Why is that? Because this statement is in violation or actually after his waiving supposedly his right to remain silent so of course you should weigh it with great, great caution and that's what I'm asking you to do. Consider whether or not it is reasonable to think that the statement was not freely and voluntarily made. It was not in this case.

Consider the totality of the circumstances. Consider the total circumstances including whether or not the defendant made the statement or when the defendant made the statement he had been threatened

in order for him to make the statement.

Consider all the circumstances that went along with that. Consider the fact that he was in a five foot by four foot room with two trained detectives with a combined experience of 25 years of police interrogation and their key target being Mr. Powell. Their key purpose being to elicit an admission from him.

Knowing the information that they knew about his girlfriend Shazetta West, knowing that she lives in section eight housing, knowing that he knew that if she should get arrested she would be kicked out. Knowing that she --

MS. BURNETT: Objection, calls for facts not in evidence.

THE COURT: I'll remind the jury to remember the facts as they remember them.

MS. FREDERIKSEN-CHERRY: It is a reasonable explanation and how even if you feel that it is not very likely, okay, that's not the standard. The standard is that is it reasonable to think this could have occurred. It is because that's what occurred, ladies and gentlemen.

Okay, the only thing that the state has here is this involuntary confession. He got up here today and told you exactly what happened and he told you he didn't know about the gun and therefore he is not guilty of felon in possession of a firearm. Thank you.

THE COURT: You used 11 minutes.

MS. FREDERIKSEN-CHERRY: Thank you, Judge.

THE COURT: You may proceed.

MS. BURNETT: Kevin Powell is guilty. He is guilty beyond a reasonable doubt. From Kevin Powell's own mouth what Detective Augeri and Detective Estevez told you they told you exactly the truth. They told you that they found a gun.

They told you it was in a room that the defendant was coming out of. They told you that the gun was under the bed.

The defendant told you that he was in that room and Detective Augeri and Detective Estevez both told you what the defendant told them on that day and the defendant admitted, I told them that. Yes, I told them that.

You heard Detective Augeri an officer with TPD for 20 years and now he's in the robbery squad.

Also you heard from Detective Estevez 11 years with the Tampa Police Department. You also heard Detective Estevez say I didn't threaten Shazeena West.

This is the same officer that as the defendant said told you exactly what the defendant told him on that night after he signed the consent to be interviewed form.

And as jurors I told you that you will have jury instructions and we talked about you can determine

what is reasonable and a reasonable doubt is not a possible doubt and it is not a speculative doubt. It is not a forced doubt.

You're all able to use common sense to determine what is reasonable and the other thing that you can do by virtue of this jury instruction is that you can weigh the evidence and the judge will tell you how you can weigh the evidence and you can decide based on these instructions what you determine is the best evidence.

And you can also determine what you shouldn't rely on and you can find some reliable and you can find some not reliable. You can disregard all or any part of any testimony that you heard.

And some of the things that you can consider are, did the witness have some interest in how the case should be decided? Well, it's obvious Kevin Powell he is the one who has an interest in how this case should be decided. He's the one on trial.

Does the witness' testimony agree with the other testimony and the other evidence in the case?

Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

And another thing that you can consider in weighing the evidence and this is why it is important not just because it is an element of the crime that the defendant is convicted of a felony but the defendant chose to make himself a witness in this case and therefore you can evaluate him based on this standard

and was it proved that the defendant had been convicted of a crime?

The defendant has not been convicted of just one crime but ten prior felonies and one prior crime of dishonesty, ten prior felonies.

But he got up here today after law enforcement as he said told you the truth about what he told that night and he said no, I lied to them that night. He made it up. That's what he wants you to believe today, today when he is on trial for being a felon in possession of a firearm. Use your common sense.

As he -- as the defendant even testified to Shazeena West was not a convicted felon. She was in section eight housing. She has the right to own a firearm. There is no crime to threaten her with if she had a firearm. She can have a firearm.

But Detective Estevez told you I -- we never -- I never threatened him with that. Does he expect the officers to make up a crime. Shazeena West can have a gun. The person who could --

MS. FREDERIKSEN-CHERRY: Objection, facts not in evidence.

THE COURT: I'll tell the jury to remember the facts as they remember them. Go ahead.

MS. BURNETT: Kevin Powell is the one who was legally unable to possess a firearm. Based on this information you can determine what is reasonable.

The jury verdict form that you will be given has two choices. One, the defendant is guilty of the Felon in Possession of a Firearm Actually possessing a firearm as charged or the defendant is guilty of Felon in Possession of a Firearm.

I would argue that the defendant was actually in possession of a firearm that day because by his own statements he carried that wherever he goes. He keeps it with him for protection and he told you that he had gone to that house and he had been there for about an hour and a half. He had brought it there that day.

MS. FREDERIKSEN-CHERRY: Objection, facts not in evidence.

THE COURT: Again I'll tell the jury to remember the facts as they remember them.

MS. BURNETT: Well, he told you that he told law enforcement he always has it with him and he always carries it with him. He had been in that house for an hour and a half.

But the instructions will also say that has been previously stated to you if a thing is in a place over which the person has control or which the person has hidden it or concealed it, it is in the constructive possession of that person.

I believe all the evidence points to the fact that he definitely had it in his hands that day. He definitely actually possessed that firearm.

He stated in terms of -- use your common sense.

If he -- he felt that he had to admit to ownership look at the details of which he gave the statement.

Not only did he say the firearm was his but he went so far as to say he brought it on the street for $150 which he admits that he said. That he carried it with him all the time. He keeps it for possession and he know he did this even though he knew he was a convicted felon.

I submit to you that if what the defendant was arguing or saying was the truth that he was threatened on that day he could have easily said it's my gun but he went into much greater detail, details that he only he would know.

The price that someone pays for a gun is not relevant. It's not one of the elements that I have to prove to prove felon in possession of a firearm.

A firearm is legally defined as a weapon which will is designed to or may readily be converted to expel a projectile by the action of an explosive.

You saw that firearm. You heard the testimony of law enforcement. That is a gun and it is designed to shoot. It is clear.

I think when you are back in the jury room and you're deliberating and you can consider the juries instructions as they are given to you about weighing the evidence and about your rules for deliberation and think about what is reasonable doubt, consider the facts that the defendant who is on trial he made himself a witness.

Law enforcement has said came in here today and told you exactly the truth. He is asking you to believe what he says today but don't believe what he said to law enforcement on August 10th.

By his own admission, his statement has no credibility. If you weigh that based on the jury instructions that he has made himself a witness disregard his testimony and find him guilty because he is guilty.

MS. FREDERIKSEN-CHERRY: Details only the defendant would know. Look at the statement, ladies and gentlemen. It is pretty general.

I think that anybody who was asked by detectives to fess up to something that they didn't do could have come up with the statement that my client made.

Brought it on the street? Okay, he's a convicted felon. We already give you that. We told you that here today and that's what he told the cops back on the night they interviewed him, okay.

These are not statements that are only known to a particular suspect with inside information, okay. These are very general. What do people use a gun for, protection, okay.

Where would he have brought it if he was a convicted felon? He wouldn't have brought it at a store so where would he have brought it? He would have brought it off the street. These are not statements that are only known to the person who committed this crime. These are very generalized statements that I say were

very short and not very detailed and none of which put the gun in his hand.

There is absolutely no evidence before you that he was actually in possession, holding an item, okay, or within close enough reach that he could control it. There is no information before you to prove that, okay. So if at all okay, they should be looking at a constructive possession argument.

Again the basic thing here is the statements. I want to go back to the analogy that I used during jury selection, okay, with the Tylenol and the poisoned pill, all right.

The point is it's not the likelihood, okay, of his statement being voluntary. It is, do you think that is a reasonable thing that could have happened, that could have occurred?

Do you have a doubt as to what went down is the way the detectives say it did and if you do is it reasonable is his explanation reasonable. It is.

Because everything that is before you, the evidence all points to the fact that certainly it is within the officer's knowledge, okay, to make that type of threat to him and again the defendant's statement should be weighed with great caution and great weight because it is such an important right and there is nothing else and I want to leave you with this, okay.

Because there were conflicting statements in the testimony, all right, for example Detective Augeri told you that Detective Camp recovered the gun and

Detective Estevez told you that he recovered the gun, okay?

Those are conflicts that also give rise to reasonable doubt that would allow you to find him not guilty but the main thing is that when you're looking at the situation and the totality of the circumstances if you have a question in your mind, okay, as to what really occurred here, the evidence that could answer that question for you is not here for you to review.

There is no physical evidence that could corroborate one story over the other. There are no written statements signed by my client in his own handwriting that might go towards corroborating a little bit more that the in facts made those statements and there is no audiotape regarding the statements.

There is no videotape of what occurred here so if you have a reasonable doubt what you should do here it could be cleared up and it might be cleared, by physical evidence that is lacking, ladies and gentlemen, and when that is lacking you should find a reasonable doubt.

I truly hope that you do in this case because my client is not guilty of possessions of a firearm. Thank you for your time.

THE COURT: Members of the jury, I want to thank you for your attention during this trial. Please pay attention to the instructions I'm about to give you.

Kevin Dewayne Powell the defendant in this case has been accused of the crime of Felon in Possession of a Firearm Actually Possessing.

To prove the crime of Felon in Possession of a Firearm Actually Possessing, the State must prove the following two elements beyond a reasonable doubt:

One, Kevin Powell had been convicted of a felony.

Two, after the conviction the defendant knowingly had in his care, custody, possession or control a firearm.

If you find the defendant's civil rights have been restored at the time of the offense you should find the defendant not guilty.

Convicted means that a judgment has been entered in a criminal proceeding by a competent court pronouncing the accused guilty.

A firearm is legally defined as any weapon which will is designed to, or may be readily converted to expel a projectile by the action of an explosive, the frame, receiver of any such weapon, any firearm muffler or firearm silencer, and any destructive device or any machine gun.

Care and custody means immediate charge and control exercised by a person over the named object. The term care, custody and control may be used interchangeably.

To possess means to have personal charge of or exercise the right of ownership, management or control over which the thing is possessed.

Possession may be actual or constructive. If a

thing is in the hand of or on the person or in a bag or container in the hand of or on the person or is so close as to be within ready reach and is under control of the person it is in the actual possession of that person. If a thing is in a place over which the person has control or in which the person has hidden it or concealed it is in the constructive possession of that person.

Possession may be joint. That is two or more persons may jointly have possession of an article exercising controlling over it. In that case each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of the thing, knowledge of its presence may not be inferred or assumed.

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant's presumption of innocence, the State has the burden of proving the crime for which the defendant is charged was committed and that the defendant is the person who committed the crime. The defendant is not required to present evidence or prove anything.

Whenever the words reasonable doubt are used

you must consider the following:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

On the other hand if after carefully considering, comparing all of the evidence there is not an abiding conviction of guilt or if having a conviction which is one which is not stable but with waivers and vacillates than the charge has not been proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial and to it alone that you are to look for that proof. A reasonable doubt as to the guilt of a defendant may arise from the evidence, a conflict in the evidence or the lack of evidence. If you have a reasonable doubt you should find the defendant not guilty. If you have no reasonable doubt you should find the defendant guilty.

It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than the other evidence.

You should consider how the witnesses acted as well as what they said.

Some of the things you should consider are one, did the witness seem to have an opportunity to see and

know the things about which the witness testified?

Two, did the witness seem to have an accurate memory?

Three, was the witness honest and straightforward in answering the attorneys' questions?

Four, did the witness have an interest in how the case should be decided?

Five, does the witness' testimony agree with the other testimony and the other evidence in the case?

Six, has any pressure or threat been used against the witness that affected the truth of the witness' testimony?

Seven, did the witness at some other time make a statement that is inconsistent with the testimony he gave in court?

Eight, was it proved that the witness had been convicted of a crime?

You may rely upon your own conclusion about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

The defendant in this case has become a witness. You should apply the same rules that you use in consideration of his testimony that you apply to the testimony of the other witnesses.

A statement claimed to have been made by the

defendant outside of court has been placed before you. Such a statement should always be considered with cause and be weighed with great care to make sure it was freely and voluntarily made.

Therefore you must determine from the evidence whether the defendant's alleged statement was knowingly, voluntarily and freely made. In making this determination you should consider the total circumstances including but not limited to one, whether when the defendant made the statement the defendant had been threatened in order to get the defendant to make the statement, and two, whether anyone had promised the defendant anything in order to get the defendant to make the statement.

If you conclude the defendant's out of court statement was not freely and voluntarily made you should disregard it.

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict.

One, you must follow the law as it is set out in these instructions. If you fail to follow the law your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

Two, this case must be decided only upon the evidence that you have heard from the testimony of witnesses and have seen in the form of exhibits and evidence and these instructions.

Three, this case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

Four, remember the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

Five, your duty is to determine if the defendant has been proven guilty or not in accord with the law. It is the judge's job to determine what a proper sentence would be if the defendant is guilty.

Six, whatever verdict you render must be unanimous. That is each juror must agree to the same verdict.

Seven, it is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called into the courtroom. A witness should not be discredited by talking to a lawyer about his testimony.

Eight, your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence and on the law contained in these instructions.

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

You may find the defendant guilty as charged in the information or guilty of such lesser included crime as the evidence may justify or not guilty.

If you return a verdict of guilty it should be for the highest offense which has been proven beyond a reasonable doubt. If you find that no crime has been proven beyond a reasonable doubt, you then of course your verdict must be not guilty.

Only one verdict may be returned as to the crime charged. This verdict must be unanimous. That is all jurors must agree to the same verdict.

The verdict must be in writing and for your convenience the necessary form of verdict have been prepared for you. They are as follows:

In the Circuit Court of the Thirteenth Judicial Circuit, the State of Florida, in and for Hillsborough County, Criminal Justice Division, the state of Florida versus Kevin Powell, case number 04-015088, Division A. Verdict form.

We, the jury find as follows as to count one of the charge, (check only one as to this count).

(A) The defendant is guilty of Felon in Possession of a Firearm Actually Possessing a Firearm as charged.

(B) The defendant is guilty of Felon in Possession of a Firearm.

(C) The defendant is not guilty. So say we all dated this blank day of January, the year 2005 with a place for the signature of the foreperson.

In just a few moments you will be taken to the jury room by the bailiff. The first thing you should do is

elect a foreperson. The foreperson presides over your deliberations like a chairman of a meeting. It will be the foreperson's job to sign and date the verdict form when all of you have agreed on a verdict in this case. The foreperson will bring the verdict form back into the courtroom when you return. Any member of the panel may be the foreperson.

Your verdict finding the defendant guilty or not guilty must be unanimous. That is the verdict must be the verdict of each juror as well as the jury as a whole. In closing let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws you must use them. For over two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate the rules that we all share.

Any additions, deletions from the state?

MS. BURNETT: Nothing from the state.

THE COURT: Any from the defense?

MS. FREDERIKSEN-CHERRY: No, Your Honor.

THE COURT: All right. Here's the verdict form. You can take the jury to the jury room. Mr. Robinson, if you would stay seated and if the other jurors would go with the bailiff.

(THE JURY RETIRED TO DELIBERATE THEIR VERDICT AT 3:30 p.m.)

THE COURT: Mr. Robinson, you may have figured out you're the alternate in this case. We only have to have six jurors to go back. We have to have six and on certain occasions we have jurors get sick and they have problems and we had a jury trial this morning that one of the jurors had a death in the family and we let them go and if we hadn't had an alternate like you we wouldn't have been able to continue with the case.

So I don't want you to think you have wasted your time because you haven't. On many occasions we have to press the alternate into service but at this point in time you're free to go. You're also free to stay and wait on a verdict and you can talk to anyone you would like from this point on, thank you. We'll be in recess pending a verdict.

(Question from the jury at 4:12 p.m.)

THE COURT: Got some questions from the jury. The first question is what are crimes of dishonesty?

The second they want a definition actual possession and third question is a definition of constructive possession. Well, I can send the jury instructions back with them. Where they at? Here they are. The crime of dishonesty, I mean how do you all want me to answer that?

You just have to use your own common sense in making that determination or is there a definition of it somewhere that you all want given? It is the opposite of honest crimes or disinterest crimes.

MS. BURNETT: I would say to use your common

sense if we can't come up with anything.

MS. FREDERIKSEN-CHERRY: Judge, I'm looking at Florida Statute 90.6 which essentially is I guess outlines the use of impeachment by convictions of crimes involving dishonesty.

There is no definition referencing -- this section does not reference a definition, Judge, and essentially it just states that a witness' credibility may be attacked by evidence that the witness had been convicted of a crime involving dishonesty or false statement and that's essentially the language.

THE COURT: Okay.

MS. FREDERIKSEN-CHERRY: I don't have any further specific definition that I would be requesting at this time, Judge.

THE COURT: How do you want me to answer it?

MS. FREDERIKSEN-CHERRY: Judge, I would just ask that you instruct them that they have all the evidence and the instructions on the law and to use the e.

THE COURT: All right. Bring them in. And I'm going to send the jury instructions back on the others because there's a definition of the actual possession and construction possession.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Ladies and gentlemen, I received

your note with the questions on it. I'm going to have to answer your questions this way. As to question number one, what is a crime of dishonesty?

I'm going to have to tell you that you have gotten all the legal jury instructions. You have heard all the testimony and my instructions on the law and you're just going to have to apply that law to the testimony you have been given in a common sense manner.

As to the definition of actual possession and the definition of actual possession, question two and three, I'm going to give you the jury instructions and they are defined in there, okay, thank you.

(THE JURY RETIRED TO DELIBERATE THEIR VERDICT AT 4:20 p.m.)

THE COURT: We will be in recess pending a verdict.

(COURT STOOD IN RECESS PENDING RECEIPT OF THE JURY'S VERDICT.)

(VERDICT AT 4:22 p.m.)

THE COURT: Bring them out.

(THE JURY ENTERED THE COURTROOM.)

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREPERSON: We have, Your Honor.

THE COURT: If you would pass your verdict to the bailiff, please. Madam Clerk, if you'd publish the verdict.

THE CLERK: The State of Florida versus Kevin Dewayne Powell, case number 04-15088, Division "A" verdict form:

We, the jury find as follows as to count one, the defendant is guilty of Felon in Possession of a Firearm, so say we all dated this 25th day of January, 2005, Mr. King -- Mr. King, foreperson of the jury.

THE COURT: All right, if you would poll the jury, Madam Clerk.

THE CLERK: Mr. King, is this your verdict?

JUROR MR. KING: It is.

THE CLERK: Ms. Washick, is this your verdict?

JUROR MS. WASHICK: Yes.

THE CLERK: Ms. Freeze, is this your verdict?

JUROR MS. WASHICK: Yes.

THE CLERK: Mr. Ahrens, is this your verdict?

JUROR MR. AHRENS: It is.

THE CLERK: Ms. Jones, is this your verdict?

JUROR MS. JONES: Yes.

THE CLERK: Ms. Rudloff, is this your verdict?

JUROR MS. RUDLOFF: Yes.

THE COURT: Ladies and gentlemen, I want to thank you for your time and consideration of this case and I also wish to advise you of some very special privileges that are enjoyed by jurors.

No juror can ever be required to talk about the discussions that occurred in a courtroom except by court order. For many centuries we have relied upon juries for the consideration of difficult cases.

Therefore for hundreds of years we have recognized that a juries deliberations, discussions and votes should remain their private affair as long as you wish it. A request may come from those who are simply curious or from those who might seek to find fault with you. It will be up to you whether to preserve your privacy as a juror. On behalf of the citizens of Hillsborough County I want to thank you for your services here this week. You're free to go.

(THE JURY LEFT THE COURTROOM.)

THE COURT: Okay, what are we doing as to sentencing?

MS. BURNETT: Your Honor, at this time the State will withdraw its HFO notice so there's no impediment to continue on with sentencing.

THE COURT: Let's do sentencing then. Any legal reason why sentence cannot be imposed?

MS. FREDERIKSEN-CHERRY: No, Your Honor.

THE COURT: All right. What says the state as to sentencing?

MS. BURNETT: The state would ask for 15 years Florida State prison.

THE COURT: What says the defense?

MS. FREDERIKSEN-CHERRY: I'm asking, Your Honor, to sentence my client to the bottom of the guidelines -- well actually he scores non-state prison, Judge, let me grab my score sheet here.

Judge, the verdict since it was returned without the actual possession, Judge, Your Honor is obviously not bound by the three year minimum mandatory. We have the corrected score sheet, Judge, and I believe that the one that Ms. Burnett and I agreed upon is scored him at 43.2 points to allow Your Honor to sentence him to something other than Florida State Prison.

I'm asking Your Honor to do so. My client although he does have a record, Judge, if you look specifically at his prior history it is all drugs and driving charges, felony driving charges is essentially what comprises his history.

I believe that I am making a correct statement to the Court when I say that there is no crime involving

any violence or anything of that nature and nothing involving firearms, Judge.

So please take that into consideration. I'm asking your Honor to sentence my client to a county jail time sentence or minimal amount of prison time if Your Honor is so inclined.

My client has been in custody since the date of the offense which is August 10th, 2004. He's never been to prison before, Judge. He's 26 years old, Judge, so I would ask Your Honor to consider county time for him.

THE COURT: Anything else anybody wishes to say?

THE DEFENDANT: I just want to thank you all for listening to me.

THE COURT: You might want to wait on that thanks. You know, I don't have any problem with people going to trial. I think you're certainly entitled to exercise your right to a trial. What I do have a problem with is people that get on the stand and what I consider to be perjury, I consider to be perjured testimony.

I'm going to adjudicate him guilty and it will be 10 years in the Florida State Prison with credit. Minimum mandatory costs imposed as a lien. He has 30 days to appeal. If you can't public defender. Good luck to you, sir.

(THE PROCEEDINGS CONCLUDED.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, COLLEEN MERRITT, AOC Circuit Court Reporter, hereby certify that I was authorized to and did report the foregoing proceedings had in the previously-styled cause; and that the preceding transcript attached hereto is a true, accurate, and correct computerized transcription of said proceedings.

I further certify that I am not employed by or related to any of the parties in this matter, nor am I financially or otherwise interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand in Tampa, Hillsborough County, Florida.

COLLEEN MERRITT
AOC Circuit Court Reporter

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARINGMOTION AND, IF FILED, DETERMINED

THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

KEVIN DEWAYNE POWELL,	)	
	)	
Appellant,	)	
V.	)	Case No. 2D05-646
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed October 10, 2007.

Appeal from the Circuit Court for Hillsborough County; Daniel Lee Perry, Judge.

James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Kevin Dewayne Powell, pro Se.
Bill McCollum, Attorney General, Tallahassee, and Deborah Fraim Hogge, Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

In this Anders[1] appeal from his judgment and sentence for felon in possession of a firearm, Kevin Dewayne Powell raised an issue of arguable merit in his pro se brief. Upon order from this court, Mr. Powell's attorney briefed the following issue: whether the trial court erred in permitting the use of Mr. Powell's statements at trial. After Miranda[2] warnings that Mr. Powell claims did not adequately inform him of his right to have counsel present during questioning, Mr. Powell told Tampa police detectives that he had purchased the firearm off the street and carried it for protection, in spite of the fact that he was a convicted felon. We hold that the warnings were deficient under the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida. We reverse Mr. Powell's conviction and remand for further proceedings.

The issue in this case, as in the recent case of M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007) (en banc), is whether the warning given to Mr. Powell complied with Miranda. In M.A.B., our court considered the adequacy of this identical warning and was evenly divided in a seven-to-seven tie. Per Florida Rule of Appellate Procedure 9.331(a), "the panel decision of the district court shall stand as the decision of the court. If there is no panel decision, a tie vote will affirm the trial court decision." In M.A.B., there was no prior panel decision; therefore, the evenly divided en banc opinion simply affirmed the trial court's decision and certified a question to the Florida Supreme Court. However, because M.A.B. lacked a majority, it is neither a binding decision nor a binding precedential opinion. See State v.

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1 Anders v. California, 386 U.S. 738 (1969).

2 Miranda v. Arizona, 384 U.S. 436 (1966).

McClung, 47 Fla. 224, 227 (Fla. 1904) (explaining that when a question of law is decided by an evenly divided court, the "judgment possesses no dignity as a judicial precedent" and it "carries on its face a badge which precludes any application" of it in the "future under the doctrine of stare decisis."); Lee v. State, 854 So. stare decisis."); Lee v. State, 854 So. 2d 709, 716 (Fla. 2d DCA 2003) (noting that "under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that" a majority of the court have joined in an opinion and a decision). Accordingly, this panel is free to address this issue.

We also note that because a majority of this court did not reach a decision on the adequacy of the Miranda warnings in M.A.B., an argument can be made that the supreme court will not have jurisdiction to answer the question we certified to it in that case.[3] We recognize that at least one other district court faced a similar situation with an en banc tie vote and relied on the flexibility inherent in the appellate rules of procedure to address it at the district court level.[4] Either way,

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3 We note that on August 21, 2007, the Florida Supreme Court granted review on M.A.B., just as the current opinion was about to issue. In light of the cases referenced in footnote 5, we include the jurisdictional discussion in an abundance of caution

4 The Florida Supreme Court stated "[c]onsistency of law within a district is essential to avoid unnecessary and costly litigation. We conclude that district court judges, through their opinions, will adopt principles to ensure this result." In Re Rule 9.331. Determination of Causes by a District Court of Appeal En Banc. Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1130 (Fla. 1982). "The district courts are free, however, to develop their own concept of decisional uniformity." Fla. R. App. P. 9.331 committee notes, 1982 amend.; see also O'Brien v. State, 478 So. 2d 497, 499 (Fla. 5th DCA 1985) (noting "inherent ambiguities of the en banc rule in regard to tie votes" and "problems of interpretation [with the en banc rule]," and adopting as a principle that an en banc

because this court was evenly divided in M.A.B., we did not actually resolve the certified question and M.A.B. may be deficient for Florida Supreme Court review.[5] The recent case of Speedway Superamerica LLC v. Superamerica LLC v. Dupont, 955 So. 2d 533 (Fla. 2007), demonstrates exactly such a scenario. Speedway Superamerica came before the Florida Supreme Court based on that court's jurisdiction to review a question certified by the district court to be a matter of great public importance. The district court had sat en banc in Speedway Superamerica, as in M.A.B. Although it initially accepted the case, the Florida Supreme Court ultimately concluded that it did not have jurisdiction to review Speedway Superamerica and dismissed the review proceedings. Id. at 534-35. Justice Pariente noted in her concurrence, "the constitution also requires that the [district] court 'pass[ ] upon a question certified

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tie affirmance becomes the binding precedent with the subject question to be certified to the Florida Supreme Court as a matter of great public importance). This court has not expressly adopted a similar approach.

5 This court has previously certified a question of great public importance to the Florida Supreme Court, but the supreme court dismissed that case for review due to a lack of jurisdiction on the basis that this court did not pass upon the question prior to certifying the question. Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973, 974 (Fla. 2001); see (Fla. 2001); see also Gee v. Seidman & Seidman, 653 So. 2d 384, 385 (Fla. 1995) (dismissing the case because the district court did not address the issue contained in the certified question); accord Revitz v. Baya, 355 So. 2d 1170, 1171 (Fla. 1977); Boler v. State, 678 So. 2d 319, 320 (Fla. 1996) (explaining that "[w]e do not have jurisdiction to answer a certified question of great public importance under article V, section 3(b)(4) where there is no district court 'decision' for our review."); but see Spence v. Hughes, 500 So. 2d 538 (Fla. 1987) (granting jurisdiction on a certified question of great public importance from a decision of an equally divided court).

by it to be of great public importance.' " Id. (citing art. V section 3(b)(4)). Justice Pariente opined that it was "questionable" whether the district court had answered the question. Id. Because of our split in M.A.B., the en banc court did not answer the certified question.

The present case contains the identical Miranda warning that was involved in M.A.B. See 957 So. 2d at 1220. Because this case is being resolved by the assigned panel, we necessarily address the issue certified in M.A.B. Our determination will "pass upon" the certified question on this point of law.

In M.A.B., every judge of this court concurred in the certification of the following question of great public importance pursuant to Article V, section 3(b)(4), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

We again certify the question as one of great public importance and, for the reasons set forth herein, answer the question in the affirmative, finding the

warning is constitutionally deficient. Because the Miranda warnings given to Mr. Powell contain limiting language as to "before questioning" and the right to consult with a lawyer, we hold such warnings failed to comply with state and federal constitutional requirements to adequately inform the accused of his or her right to have an attorney present throughout interrogation.

STATEMENT OF THE FACTS

On August 10, 2004, Tampa Detectives Salvatore Augeri, Randy Estevez and other officers went to a residence in Tampa to investigate Mr. Powell. Shazeena West, Mr. Powell's girlfriend, allowed the officers to enter her apartment. Mr. Powell was one of at least four adults present in the apartment when police arrived. He was in the upstairs hallway coming from near the southeast corner bedroom. The officers searched that bedroom and under the bed found a loaded nine-millimeter handgun.[6] Mr. Powell was arrested and transported to Tampa Police headquarters where he was questioned after being advised of his rights under Miranda. According to police, Mr. Powell agreed to talk.

During the direct examination of Detective Augeri, prior to his testimony concerning statements

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6 Mr. Powell filed a pro se motion to suppress the results of the search of the house. It is unclear from our record whether the motion was denied or withdrawn, but in either event, the case proceeded to trial. Testimony at trial indicated that police arrived at the girlfriend's apartment looking for Mr. Powell in reference to another matter. They testified that she let them in but the record is silent about whether she provided permission to search the individual rooms of the apartment.

that Mr. Powell allegedly made, defense counsel objected on the ground that the Miranda warning was invalid. The trial court allowed defense counsel to voir dire the witness. The subsequent testimony revealed that the standard police department Form 310 used during the interrogation of Mr. Powell did not explicitly indicate that he had the right to have an attorney present during questioning. Detective Augeri testified that he witnessed another officer read Form 310 verbatim to Mr. Powell. The written warning, which was introduced at trial as an exhibit, states as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

A bench conference was held, and the court ruled that the recitation concerning the right to an attorney before questioning was adequate. The detective then testified that Mr. Powell said the firearm was his and that he had purchased it on the street and carried it for protection, even though he was a convicted felon.[7]

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7 Although it was not argued in the trial court, a possible corpus delicti issue exists. In order to introduce Mr. Powell's confession, the State was required to prove that Mr. Powell constructively possessed the weapon. The general order of proof is to show that a crime has been committed and then that the

Defense counsel renewed her objection to admitting Mr. Powell's custodial statement. The trial court overruled this objection. Mr. Powell then testified in his own defense. He said that he did not live at the apartment on August 10, 2004, but he heard a commotion when the officers entered. He said he was handcuffed and taken into custody. He testified he did not know the gun was present under the bed because he only stayed at that address every once in a while.[8] Mr. Powell was convicted and sentenced to ten years in prison.

ANALYSIS

Although decisional law has not prescribed

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defendant committed it. Spanish v. State, 45 So. 2d 753, 754 (Fla. 1950); see State v. Allen, 335 So. 2d 823, 825-825 (Fla. 1976). A defendant's confession or statement "may be considered in connection with other evidence" but corpus delicti cannot rest upon the confession or admission alone. Cross v. State, 119 So. 380, 384 (Fla. 1928). Before a confession or statement may be admitted there must be prima facie proof tending to show the crime was committed. Farinas v. State, 569 So. 2d 425 (Fla. 1990); Bassett v. State, 449 So. 2d 803 (Fla. 1984); Frazier v State 2d 803 (Fla. 1984); Frazier v. State, 107 So. 2d 16, 26 (Fla. 1958). In the present case, although Mr. Powell stipulated he was a convicted felon, there was no independent proof that he possessed a firearm. There were several other adults in the apartment at the time of Mr. Powell's arrest. The State did not introduce forensic evidence from the gun or elicit any testimony that would place the firearm in Mr. Powell's possession. Simply put, there was no evidence other than the unwarned statements Mr. Powell made to establish that a crime had been committed.

8 Mr. Powell testified that his custodial statements to detectives concerning the gun were untrue. He testified that he signed the consent form waiving his rights and made false the statements because the detectives threatened to charge his girlfriend with possessing the firearm. On rebuttal the detectives denied threatening Mr. Powell.

talismanic warning language, we conclude the warning given to Mr. Powell did not comply with the dictates of Miranda and its progeny. Critical in this analysis is Miranda's mandate that a suspect be told that he or she has the right to the presence of an attorney. This is the overarching right from which the right to talk to or consult with an attorney flows. Advising a suspect that he or she has the right "to talk to a lawyer *before* answering . . . any of our questions" constitutes a narrower and less functional warning than that required by Miranda.[9]

The Fifth Amendment to the United States Constitution specifies that no person "shall be compelled in any criminal case to be a witness against himself." To ensure compliance with the protections of the Self-Incrimination Clause when a suspect has been deprived of freedom during a custodial interrogation, the Court identified four essential warnings in Miranda:

> [I] [A suspect:] must be warned prior to any [custodial] questioning that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4]

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9 Were we writing on a clean slate, we would rephrase the question in the following manner: IS THE MIRANDA REQUIREMENT THAT A SUSPECT BE WARNED OF THE RIGHT TO THE PRESENCE OF AN ATTORNEY VIOLATED WHEN A SUSPECT IS WARNED THAT "YOU HAVE THE RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY OF OUR QUESTIONS" AND "YOU HAVE THE RIGHT TO USE ANY OF THESE RIGHTS AT ANY TIME YOU WANT DURING THIS INTERVIEW"? We likewise answer this question in the affirmative.

> that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479.

Clearly, suspects must be specifically informed that they possess these constitutional rights before law enforcement officers may undertake any custodial questioning to solicit incriminating statements that will later be used against them in court. This case focuses on the third right—the right to the presence of an attorney—which "must be afforded to [suspects] throughout the interrogation." Id. (emphasis added.) Due to the deficiency in the wording of the warning given to Mr. Powell, he was not unequivocally informed that he had the right to the presence of an attorney during questioning. Another district court has held that, although warnings need not be administered in the exact form set out in Miranda, the person in custody must be clearly advised of the right to have an attorney present not only before interrogation but during interrogation as well. Roberts v. State, 874 So. 2d 1225, 1226 (Fla. 4th DCA 2004).

Our holding is derived not only from Miranda but also from the Court's observations concerning that case in Dickerson v. United States, 530 U.S. 428 (2000). Chief Justice Rehnquist, in his analysis of the underpinnings of the Miranda rule and the evolution of the law governing voluntariness and admissibility of a suspect's confession, reiterated the constitutional bases for the voluntariness requirement. Prior to Miranda, such protections were historically premised on both the

Self-Incrimination Clause and the Due Process Clause[10] of the Fourteenth Amendment, but Miranda changed the focus of the Fifth Amendment inquiry. Dickerson, 530 U.S. at 433-34. No longer was physical brutality or the "third degree" the major evil to be stemmed; by the time the Court decided Miranda in 1966, law enforcement departments, seizing advantage from the fact that "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals," had developed psychologically coercive practices to extract statements from suspects in custody. Id. at 435 (quoting Miranda, 384 U.S. at 455). Interrogators were trained to isolate the subject, create an atmosphere of domination, posit the guilt of the accused as a fact, and use various tactics to create hostility. Miranda, 384 U.S. at 450-451. The Dickerson Court therefore again emphasized that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" that a suspect's Fifth Amendment privilege against self-incrimination will be obliterated. 530 U.S. at 435.

Because the rule announced in Miranda is inextricably bound to a suspect's Fifth Amendment privilege, the warnings have taken on constitutional

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10 In the landmark confession case, Brown v. Mississippi, 297 U.S. 278, 281-86 (1936), police testified that they physically abused the defendants prior to their confessions. The Court reversed based on a denial of due process under the Fourteenth Amendment and admonished the trial court stating, "[t]he rack and torture chamber may not be substituted for the witness stand." Id. at 286-87. It was not until Malloy v. Hogan, 378 U.S. 1 (1964), that the Court held the self-incrimination clause of the Fifth Amendment was applicable to the states. Miranda was decided two years later.

dimensions. In order to guard against the unacceptable risk of violating a suspect's privilege against self-incrimination, "the Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief." United States v. Patane, 542 U.S. 630, 639 (2004) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.). A concomitant disadvantage of the Miranda rule is that "statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." Dickerson, 530 U.S. at 444.

In order to dispel the compulsion and coercion inherent in custodial surroundings, the Miranda rule requires the disclosure of important safeguards, including the presence of counsel to "insure that statements made in the government-established atmosphere are not the product of compulsion." Miranda, 384 U.S. at 466. The Court's emphasis on the need for counsel's presence could not have been stronger:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech

> remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. . . . Even preliminary Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 469-70 (citations omitted; emphasis added).

The warning that Mr. Powell received was constitutionally flawed because the right to talk to or consult with an attorney before questioning is not identical to the right to the presence of an attorney during questioning. Miranda requires that suspects be "clearly informed" of their right to have a lawyer with them during questioning. Id. at 471. "[T]his warning is an absolute prerequisite to interrogation." Id. at 472. The purported safe harbor language that Mr. Powell was informed of his "right to use any of these rights at any time. . . during this interview"—simply cannot cure the deficiency because Mr. Powell was never informed that he had the right to have a lawyer with him at all times during his custodial interrogation.

Although there presently exists no talismanic

warning language, Miranda's hallmark is the need for effective communication to a suspect of the basic constitutional right against self-incrimination, including the right to the presence of counsel. The ability to talk to a lawyer before answering questions, which Mr. Powell was told was his right, is derivative of his and every suspect's greater right to have an attorney present at all times during custodial interrogation. That greater right was never unequivocally conveyed to Mr. Powell. Thus, the language used by the police department in this case does not rise to a functional equivalent of the required Miranda warning.

The Supreme Court's position in Miranda was informed by the experience of law enforcement practices existing both before and at the time of the opinion. The Court concluded such interrogation techniques necessitated a protective constitutional rule. The necessity for this rule has been woven into our constitutional fabric. Dickerson, 530 U.S. at 431. We measure and cut our position here from that same constitutional cloth. We focus not on how the words might be parsed afterwards, but rather on the contemporaneous character of the informational warning: whether, at the moment given, the language clearly communicated the right to have an attorney present during questioning, as required by Miranda. In our view, when a less than complete warning is given to a suspect in custody, it tears at this constitutional fabric.

> Over a century ago, Oliver Wendell Holmes wrote:
>
> The life of the law has not been logic: it

> has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

The Common Law 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881). Miranda exists so that those experiences described in the opinion are not repeated; and, if repeated, then, as a matter of law, a penalty is extracted.

Allowing Mr. Powell's custodial statements to be used against him violated his constitutional rights. We therefore hold that the court should have suppressed his statements.

As we did in M.A.B., we certify the following question as one of great public importance pursuant to Article V, section 3(b)(4), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING

QUESTIONING?

We answer the certified question in the affirmative. We hold that the warnings provided in this case were constitutionally deficient, under the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida, and failed to comply with the Miranda requirements. Accordingly, we reverse Mr. Powell's conviction and remand for further proceedings.

Reversed and remanded.

SILBERMAN, J., Concurs.
KELLY, J., Concurs in part; dissents in part.

KELLY, J., Concurring in part; dissenting in part.

Properly framed, the test for reviewing the adequacy of the warnings provided by law enforcement to an individual taken into custody "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)). In my view, Mr. Powell was not deprived of any information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by Miranda," I respectfully dissent from the majority opinion to the extent that it holds otherwise. See id. at 203, 205. Although the majority's thoughtful analysis of the issue is not without persuasive force, I believe the reasoning detailed in Judge Canady's

opinion in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d So. 2d 1219 (Fla. 2d DCA 2007), is more in line with the body of precedent the Supreme Court has provided for guidance on this issue, and accordingly, I adopt that reasoning as my own. I fully concur, however, with the majority's conclusion that, in light of this court's evenly divided opinion in M.A.B., it is appropriate for this panel to address the issue of the adequacy of the Miranda warnings Mr. Powell received.

SUPREME COURT OF FLORIDA

No. SCO7-2295

STATE OF FLORIDA,

Petitioner,

vs.

KEVIN DEWAYNE POWELL,

Respondent.

[September 29, 2008]
REVISED OPINION

QUINCE, C.J.

This case is before the Court for review of the decision of the Second District Court of Appeal in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007). In its decision the district court ruled upon the following question, which the court certified to be of great public importance:

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA[1] WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

Id. at 1067-68. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons explained below, we answer the question in the affirmative and approve the decision below.

FACTS AND PROCEDURAL HISTORY

In Powell, 969 So. 2d 1060, the Second District Court of Appeal summarized the facts as follows:

> On August 10, 2004, Tampa Detectives Salvatore Augeri, Randy Estevez and other officers went to a residence in Tampa to investigate Mr. Powell. Shazeena West, Mr. Powell's girlfriend, allowed the officers to enter her apartment. Mr. Powell was one of at least four adults present in the apartment when police arrived. He was in the upstairs hallway coming from near the southeast corner bedroom. The officers searched that bedroom and under the bed found a loaded

1 Miranda v. Arizona, 384 U.S. 436 (1966).

nine-millimeter handgun. Mr. Powell was arrested and transported to Tampa Police headquarters where he was questioned after being advised of his rights under Miranda. According to police, Mr. Powell agreed to talk.

During the direct examination of Detective Augeri, prior to his testimony concerning statements that Mr. Powell allegedly made, defense counsel objected on the ground that the Miranda warning was invalid. The trial court allowed defense counsel to voir dire the witness. The subsequent testimony revealed that the standard police department Form 310 used during the interrogation of Mr. Powell did not explicitly indicate that he had the right to have an attorney present during questioning. Detective Augeri testified that he witnessed another officer read Form 310 verbatim to Mr. Powell. The written warning, which was introduced at trial as an exhibit, states as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for

> you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.
>
> A bench conference was held, and the court ruled that the recitation concerning the right to an attorney before questioning was adequate. The detective then testified that Mr. Powell said the firearm was his and that he had purchased it on the street and carried it for protection, even though he was a convicted felon. Defense counsel renewed her objection to admitting Mr. Powell's custodial statement. The trial court overruled this objection. Mr. Powell then testified in his own defense. He said that he did not live at the apartment on August 10, 2004, but he heard a commotion when the officers entered. He said he was handcuffed and taken into custody. He testified he did not know the gun was present under the bed because he only stayed at that address every once in a while. Mr. Powell was convicted and sentenced to ten years in prison.

Powell, 969 So. 2d at 1063-64 (footnotes omitted).

On appeal, the Second District reversed Powell's conviction. See Powell, 969 So. 2d at 1068. The court held that the Miranda warnings that were given to Powell were deficient under the Fifth Amendment of the

United States Constitution and article I, section 9 of the Florida Constitution. See Powell, 969 So. 2d at 1061. The warning did not comply with the dictates of Miranda and its progeny. See Powell, 969 So. 2d at 1064. The court reasoned that to advise a suspect that he "has the right 'to talk to a lawyer before answering. . . any of our questions' constitutes a narrower and less functional warning than that required by Miranda." Powell, 969 So. 2d at 1064. The court further noted that Miranda requires that a suspect be "clearly informed" of his right to have a lawyer with him during questioning. See Powell, 969 So. 2d at 1067 (citing Miranda, 384 U.S. at 471). The court further reasoned that the warning given to Powell was constitutionally flawed because "the right to talk to or consult with an attorney before questioning is not identical to the right to the presence of an attorney during questioning." Id. The court further reasoned that the language, "right to use any of these rights at any time . . . during this interview," cannot cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation. Id. Moreover, concerning the language used in the warning, the court focused on whether at the moment given the language clearly communicated the right to have an attorney present during questioning and not how the words might be analyzed afterwards. See id.

Pursuant to article V, section 3, subsection (b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), the Second District certified the question as one of great public importance. See Powell, 969 So. 2d at 1067-68. We granted review to answer the certified question.

ANALYSIS

The issue before this Court is whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in Miranda v. Arizona, 384 U.S. 436 (1966). Powell argues that the trial court erred in failing to grant his motion to suppress because the Miranda warnings that were given were inadequate. In reviewing a motion to suppress, this Court has explained:

> An appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence. Appellate review of the trial court's application of the law to the historical facts is de novo. Accordingly, "appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the. . . Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution."

Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007) (citations omitted) (quoting Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005)).

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." To

ensure compliance with the privilege against self-incrimination, the United States Supreme Court outlined in Miranda v. Arizona four procedural safeguards that must be employed to protect the privilege when an individual has been deprived of freedom during a custodial interrogation:

> He must be warned prior to any questioning that [1] he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479 (emphasis added). In explaining the reasons for an expansive reading of the Fifth Amendment, the Supreme Court said:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends

> not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 469-70 (emphasis added). The Court unequivocally said that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Id. at 471. The Court noted that the individual's opportunity to exercise these rights must be afforded throughout the interrogation. See id.

1. The General Scope of the Miranda Warnings

In applying the Miranda principles, the Supreme Court has said that Miranda does not mandate that the warnings be a "virtual incantation of the precise language contained in the Miranda opinion." California v. Prysock, 453 U.S. 355, 355 (1981). Moreover, in Duckworth v. Eagan, 492 U.S. 195 (1989), the Supreme Court further said that "[r]eviewing courts ... need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Id. at 203 (quoting Prysock, 453 U.S. at 361).

Similarly, to ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution, this Court in Traylor v. State, 596 So. 2d 957 (Fla. 1992), outlined the following rights

Florida suspects must be told of prior to custodial interrogation:

> [1] they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help[2] and [4] that if they cannot pay for a lawyer one will be appointed to help them.

Id at 966 (footnote omitted); see also Cuervo, 967 So. 2d at 160 (reiterating the Miranda warnings). In Anderson v. State, 863 So. 2d 169 (Fla. 2003), we further noted, "Although Miranda warnings must be given to suspects before custodial interrogation can begin, there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, as long as the warnings are not misleading." Id. at 182. However, we also unequivocally said that the help of an attorney includes both the right to consult with an attorney before questioning and the right to have an attorney present during questioning. Traylor, 596 So. 2d at 966 n.13.

2. Express Mention of the Presence of Counsel

In Miranda, the Supreme Court discussed with apparent approval the FBI's standard warning form. See 384 U.S. at 484-85. The standard warning did not expressly advise a suspect of the right to the presence of

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2 This Court explained that "help" means "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." Traylor, 596 So. 2d at 966 n. 13.

counsel during questioning. See id. The Court found that the warnings advised the suspects of their constitutional rights. See id. However, the Court additionally noted that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)). Despite this seeming approval of the FBI warnings, the Court suppressed all of the confessions or statements that were given in the four cases before the Court in Miranda. For example, in the case involving the defendant Miranda, the Supreme Court reversed his conviction and said, "[I]t is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner." Id. at 492 (emphasis added).[3]

In reversing the defendant's conviction in the Vignera v. New York case, the Court said, "Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present. . . ." 384 U.S. at 494 (emphasis added). At the trial the defense

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3 One of the police officers involved in the Miranda case testified at trial that he did not tell the defendant that anything he said could be used against him or that he had the right to consult with a lawyer. See 384 U.S. at 492 n.66.

had attempted to question the police officer concerning whether Vignera had been informed of his right to counsel prior to interrogation. The trial judge sustained the State's objection to the question, thus precluding the defense from showing that the proper warnings had not been given. See id. at 493. In addition, the verbatim transcription of the questioning of the defendant did not demonstrate that warnings had been given.

The third case in the Miranda grouping, Westover v. United States, involved a situation where the Kansas City police questioned the defendant for a number of hours. See 384 U.S. at 494-95. There was no indication that the local police had given the defendant any Fifth Amendment warnings. See id. at 495. After the police concluded their interrogation, Westover was immediately turned over to the FBI for questioning. See id. The questioning took place at the same police station where the local police had questioned the defendant. See id. At trial one of the FBI agents testified that the defendant was told he did not have to make a statement, any statement made could be used against him, and he had the right to see an attorney. See id. The Supreme Court reversed the conviction despite the testimony of the agent and in doing so the Court said, "There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation." Id. at 496. In the final Miranda case, California v. Stewart, the Supreme Court affirmed the California Supreme Court's determination that the defendant's confession should have been suppressed because the record did not state whether the defendant had been advised of his right to remain silent or his right to counsel. See id. at 497-98.

While the four cases that were the subject of the Miranda decision did not present the type of factual scenario or the exact question we address today, some state and federal courts have addressed the exact issue of whether a suspect must be informed of the right to the presence of counsel during questioning with differing results. The principles espoused in the Miranda decision formed the basis of how these courts have treated the warnings.

A. Federal Courts

The federal courts are split regarding the necessity for express warnings of the right to have counsel present during interrogation. Several of the federal circuits have held that a suspect is entitled to be expressly informed of the right to have counsel present during questioning. In United States v. Tillman, 963 F.2d 137 (6th Cir. 1992), the defendant was informed: "[You have] the right to remain silent, the right to the presence of an attorney if [you] so wish, [you] are not required to answer any questions and if [you] decide to answer questions [you] can stop and do so. . . ." Id. at 140. The defendant argued that the Miranda warnings read to him were inadequate because he was never told that any statements he might make could be used against him, and that he was not informed he was entitled to an attorney during questioning in addition to before questioning. Tilman, 963 F.2d at 140. The Sixth Circuit agreed and held that the statements made by the defendant subsequent to his arrest should be suppressed. See id. at 142. The court found a Miranda violation because the police failed to inform the defendant that he had the right to an attorney before,

during, and after questioning. See Tiliman, 963 F.2d at 141.

Additionally, in Montoya v. United States, 392 F.2d 731 (5th Cir. 1968), the Fifth Circuit found the warnings insufficient, Id. at 732. The customs agent testified that he informed the defendant as follows:

> [S]he had the right to remain silent, that anything she might say could be used against her if she was tried. [S]he had a right to an attorney, and, if she could not afford an attorney, one would be provided for her. [S]he could terminate the interview at any time she so desired.

Id. at 733. The court held that the defendant's confession was fatally defective under Miranda because "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Montoya, 392 F.2d at 734 (quoting Miranda, 384 U.S. at 471). The court reasoned that this warning is an absolute prerequisite to interrogation. See id. at 735; see also United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984) (holding that the right of the accused to be told that he can have counsel present during questioning is meaningful and mandated by the United States Constitution); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968) (noting that merely telling an individual that he could speak with an attorney before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation).

In contrast, several other circuits have found warnings adequate that did not expressly inform the defendant of the right to have counsel present during questioning. For example, in United States v. Frankson, 83 F.3d 79 (4th Cir. 1996), the defendant was informed: "[Y]ou have the right to an attorney." Id. at 81. The officer told the defendant that "while he was talking to [the officer], he was free to stop talking to [the officer] at any time." Id. Frankson contended that the officer's warning failed to satisfy Miranda because it did not convey that he had the right to talk with counsel prior to the interrogation or the right to have counsel present during the interrogation. See Frankson, 83 F.3d at 81. The court held that the defendant's Miranda warnings were not erroneous because the warnings "communicated to [the defendant] that his right to an attorney began immediately and continued forward in time without qualification." Frankson, 83 F.3d at 82.

More recent, in Bridgers v. Dretke, 431 F.3d 853 (5th Cir. 2005), cert. denied, 548 U.S. 909 (2006), the defendant was informed of his right to the presence of an attorney prior to any questioning. See id. at 856. Bridgers contended that the warnings he received were inadequate under Miranda because the warnings did not also explicitly state that he had a right to consult an attorney during questioning. See Dretke, 431 F.3d at 857. The court found the state appellate court's decision upholding the warning was adequate because it was a reasonable application of clearly established federal law. See id. at 858-60.[4]

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4 Under similar circumstances other federal circuits have held the warnings adequate. See, eg., United States v. Caldwell, 954 F.2d 496, 504 (8th Cir. 1992) (noting that the general warning could

B. Florida Courts

After our holding in Traylor, we reiterated the principles espoused in Traylor and the Miranda decision in several other decisions from this Court. In both Ramirez v. State, 739 So. 2d 568 (Fla. 1999), and Sapp v. State, 690 So. 2d 581 (Fla. 1997), neither of which presented the exact issue involved in the case that is presently before us, we noted the requirements of both the Fifth Amendment, as explained in Miranda, and the Florida Constitution, as explained in Traylor. Our explanation of the federal and state requirements included the requirement that a suspect be informed of the right to have counsel present during questioning. See Ramirez, 739 So. 2d at 573 (quoting from Miranda that suspects must be informed that they have a right to an attorney during questioning); Sapp, 690 So. 2d at 583-84 (citing to Miranda for the proposition that an individual has the right to have counsel present during custodial interrogation).

More recently, the issue of whether Miranda requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation has been addressed by several of the Florida district courts of appeal. In addition to the

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not have misled the defendant into believing that an attorney could not be present during questioning); United States v. Anthon, 648 F.2d 669, 674 (10th Cir. 1981) (holding that the warnings were adequate even though defendant "was not advised of the right to have counsel present during questioning and the right to stop the questioning at any time"); United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973) (holding that the Miranda warnings were satisfactory even though the warnings did not inform the suspect specifically of his right to have an attorney present during questioning).

Powell case, the Second District addressed this issue in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007) (en banc); Mitchell v. State, 32 Fla. L. Weekly D2958 (Fla. 2d DCA Dec. 14, 2007), notice invoking discretionary jurisdiction filed, No. SCO7-2429 (Fla. Dec. 28, 2007); and Seward v. State, 973 So. 2d 578 (Fla. 2d DCA 2008). As in this case, the defendants in these three cases argued that the Miranda warnings given to them were inadequate because the warnings did not specifically inform them of the right to have counsel present during police questioning. In M.A.B., considering the case en banc, the Second District was evenly divided seven-to-seven; thus, a majority of the court did not reach a decision on the adequacy of the Miranda warnings.[5]

Subsequent to M.A.B., the Second District decided Powell and applied Powell when it decided in Mitchell and Seward that the Miranda warnings were deficient because the warnings did not specifically inform the defendants of their right to have counsel present during questioning. Later, however, in Graham v. State, 974 So. 2d 440 (Fla. 2d DCA 2007), the Second District distinguished Powell because the police in Graham advised the defendant that he had the right to the presence of an attorney and did not include any timeframe limitation. See Graham, 974 So. 2d at 440.

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5 Judge Canady's concurring opinion sets forth some case law from other courts that address this issue and that are consistent with the court's ultimate affirmance of the trial court's denial of the motion to suppress. See United States v. Vanterpool, 394 F.2d 697, 699 (2d Cir. 1968); United States v. Anderson, 394 F.2d 743, 746-47 (2d Cir. 1968); State v. Arnold, 496 P.2d 919, 922-23 (Or. Ct. App. 1972).

In multiple cases the Fourth District Court of Appeal has addressed the issue of whether an individual must be expressly informed of his right to the presence of counsel during custodial interrogation. In Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), the police advised the defendant: "You have the right to talk with a lawyer and have a lawyer present before any questioning. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish." Id. at 1226. The defendant contended that he did not knowingly and intelligently waive his constitutional rights under Miranda because the Miranda warning he received failed to inform him that he had a right to have an attorney present during questioning. See Roberts, 874 So. 2d at 1226. The district court agreed and reversed his conviction. See id.[6] The court reasoned that nowhere does the Miranda form advise the defendant of his right to have a lawyer present during questioning. See Roberts, 874 So. 2d at 1226. The use of

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6 The Fourth District held similarly in Martin v. State, 921 So. 2d 697 (Fla. 4th DCA 2006) (holding warning constitutionally defective because it did not advise the defendant of the right to counsel during questioning); Ripley v. State, 898 So. 2d 1078 (Fla. 4th DCA 2005) (finding at that time Broward County Sheriff's Office standard warnings defective because warnings did not advise of right to have counsel present during questioning); Bross v. State, 898 So. 2d 1027 (Fla. 4th DCA 2005) (reversing conviction because Miranda warnings did not inform the defendant of the right to have counsel present during questioning); Cook v. State, 896 So. 2d 885 (Fla. 4th DCA 2005) (warning that advises the defendant of the right to talk to an attorney and have an attorney present before any questioning did not advise defendant of the right to have counsel present during questioning); Dendy v. State, 896 So. 2d 800 (Fla. 4th DCA 2005) (finding at that time Broward County Sheriff's Office standard warnings did not advise the defendant of the right to have counsel present during questioning).

the "before questioning" warning alone suggests that the suspect was misled into believing that the attorney could not be present during questioning itself. See id. at 1228 (citing Caldwell, 954 F.2d at 504). Moreover, the court rejected the State's argument that the defendant understood his rights because he also signed a "waiver of rights" Miranda form. See Roberts, 874 So. 2d at 1229.[7]

Thereafter, the court, in Franklin v. State, 876 So. 2d 607 (Fla. 4th DCA 2004), and West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004), relied on Roberts and reversed the convictions where the same deficient warnings were given. The defendant in Franklin presented to the trial court ninety forms used by both state and federal law enforcement agencies. Eighty-nine of the forms advised the defendant that he or she could consult with an attorney during questioning. Only the form that was used in Franklin's case did not contain that advice. Additionally, in support of its finding that the omitted warning was critical, the court cited language from Duckworth v. Eagan, 492 U.S. 195 (1989), indicating that Miranda does not require law enforcement to produce attorneys as if on call, but Miranda does require that a suspect be informed that he has the right to an attorney before and during questioning. See Franklin, 876 So. 2d at 608.[8]

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7 The court, after finding the motion to suppress should have been granted, engaged in a harmless error analysis and found the error was not harmless beyond a reasonable doubt.

8 We note that the Fourth District in Canete v. State, 921 So. 2d 687 (Fla. 4th DCA 2006) (en banc), distinguished the warnings given in that case from the warnings given in Roberts by opining that the defendant was not misled by the warnings.

The Fifth District also addressed a similar issue in Maxwell v. State, 917 So. 2d 404 (Fla. 5th DCA 2006), and Octave v. State, 925 So. 2d 1128 (Fla. 5th DCA 2006). In Maxwell, the police officer failed to advise the defendant that "he had a right to have an attorney present during questioning and that an attorney would be appointed to represent him if he could not afford one." 917 So. 2d at 406. Accordingly, the district court held that the trial court erred in failing to grant the motion to suppress. The district court noted:

> We do not believe that even the most erudite or mature individual could reasonably discern with the level of understanding required by Miranda that the warning given to Jonathan—that he "had the right to an attorney"—encompasses the right to have an attorney present during questioning and the right to have one appointed in the event the individual could not afford to hire one. Failure to provide these warnings to Jonathan renders the statements he made inadmissible.

See id. at 409. Similarly, in Octave, the police only explained to the defendant that she had a right to counsel. See 925 So. 2d at 1129. Citing Maxwell, the court reversed the trial court's denial of the motion to suppress, finding the warnings given did not apprise the

defendant of her right to have a lawyer present during questioning.[9]

3. Warnings Given to Powell

The Miranda warnings given to Powell were:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell, 969 So. 2d at 1064 (emphasis added). The inquiry is whether the failure to clearly inform the defendant of the right to the presence of counsel during

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9 Recently, in State v. Modeste, 987 So. 2d 787 (Fla. 5th DCA 2008) (en banc), the Fifth District receded from its previous holding in Maxwell and Octave. See Modeste, 987 So. 2d at 790. Specifically, the court receded from its previous holding that a Miranda warning is inadequate when the suspect is not expressly advised that the right to counsel includes the right to have counsel present during custodial interrogation. Modeste, 987 So. 2d at 790. The Fifth District concluded that while the language in Miranda might indicate that a suspect must be expressly advised of the right to have counsel present during questioning, a close reading of Miranda strongly suggests a contrary conclusion. See Modeste, 987 So. 2d at 790 (citing M.A.B v. State, 957 So. 2d 1219, 1222-27 (Fla. 2d DCA 2007) (Canady, J., concurring), review granted, 962 So. 2d 337 (Fla. 2007)).

custodial interrogation violates the principles espoused in Miranda. The warnings given must be sufficient to convey the rights to a person of ordinary intelligence and common understanding. See Missouri v. Seibert, 542 U.S. 600, 615-16 (2004) (noting that a reasonable person in the suspect's shoes could have seen the questioning as a new and distinct experience). The State contends that the totality of the Miranda warnings read to Powell touched the bases required by Miranda and did not deprive him of any information essential to his ability to knowingly waive his privilege against self-incrimination. In contrast, Powell contends that the warnings place a limit on an unlimited right to consult counsel before, during, and after interrogation. We hold that Powell was not clearly informed of his right to have counsel present during questioning.

Under article I, section 9 of the Florida Constitution, as interpreted in Traylor v. State, a defendant has a right to lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. Accord Ramirez, 739 So. 2d at 573 (finding suspects must be informed that they have a right to an attorney during questioning); Sapp, 690 So. 2d at 583-84 (same). The standard police department Miranda form used during the interrogation of Powell did not expressly indicate that he had the right to have an attorney present during questioning. Powell was told he had the right to talk with a lawyer before questioning and that he could use that right at any time during the interview. The right he could use during the interview was the right he was—told he had—to talk with a lawyer before answering questions. This is not the functional equivalent of having the lawyer present with you during

questioning. As stated in Miranda, "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." Thus, "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." Miranda, 384 U.S. at 469-70.

The State contends that since the Miranda decision, the United States Supreme Court has held that Miranda did not require of or impose upon law enforcement a rigid and precise formulation of the warnings to be given to a criminal defendant. In Anderson, we also noted that "there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, as long as the warnings are not misleading." 863 So. 2d at 182 (emphasis added). In this case the warning was misleading. The warning said "before answering any questions." The "before questioning" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

The State further contends that the final warning, "You have the right to use any of these rights at any time you want during this interview," reasonably informed Powell of the right to have an attorney present during the interrogation. The Second District disagreed and found that language could not cure the deficiency because Powell was never unequivocally informed that he had the right to have an attorney present at all times during his custodial interrogation. See Powell, 969 So.

2d at 1067. We agree with the Second District and hold that Powell should have been clearly informed of his right the presence of counsel during the custodial interrogation. The catch-all language did not effectively convey to Powell his right to the presence of counsel before and during police questioning. This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

Lastly the State argues that Powell had actual knowledge of his rights based on his prior dealings with law enforcement. However, in Miranda the Court disapproved of a case-by-case inquiry into whether or not a suspect was aware of the unarticulated right. The Court said:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever

> the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

384 U.S. at 468-69 (footnote omitted). Powell's prior dealings with law enforcement cannot substitute for adequate Miranda warnings.

4. Harmless Error

Because the erroneous admission of statements obtained in violation of Miranda is subject to harmless error analysis, we next consider whether the error in this case was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967); Caso v. State, 524 So. 2d 422, 425-26 (Fla. 1988). In order to find the error harmless, we must find that beyond a reasonable doubt the admission of the confession did not affect the jury's verdict. See Thompson v. State, 595 So. 2d 16, 18 (Fla. 1992) (citing Caso, 524 So. 2d at 425-26); State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)).

The evidence, absent the statement, tending to connect Powell to this crime consists of the following: (1) Powell was one of at least four adults present in the apartment where the handgun was found, and (2) Powell was in the upstairs hallway coming from near the southeast corner bedroom where the loaded nine-millimeter handgun was found under a bed. The firearm was not found on Powell or within close proximity to him. There was no forensic evidence introduced about

the gun or any testimony elicited from witnesses that would place the firearm in Powell's possession. Therefore, with the exception of Powell's unwarned statements, the evidence does not establish that Powell committed the crime of possession of a firearm. Therefore, we find the error is not harmless beyond a reasonable doubt.

Our decision today is not to be applied retroactively to cases that are already final on the date of this opinion. The decision made today is not new law and is not entitled to retroactive application.

CONCLUSION

Because Powell was not clearly informed of his right to the presence of counsel during the custodial interrogation, we agree with the Second District and answer the certified question in the affirmative. Thus, we also agree with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by Miranda. Both Miranda and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. Based on this conclusion, we approve the Second District's decision in Powell to the extent the decision is consistent with this opinion.

It is so ordered.

ANSTEAD, PARIENTE, LEWIS, and BELL, JJ., concur. PARIENTE, J., concurs with an opinion, in which ANSTEAD and LEWIS, JJ., concur.

WELLS, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

Justice Wells expressed concerns in his dissent that our decision will "unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel." The answer to these concerns is straightforward. Indeed, in this case, it is difficult to understand how informing Powell that he had a right to an attorney both before and during questioning would have impeded the investigation of the officers questioning Powell.[10]

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10 A proper Miranda warning in this case could have been as simple as the following

> You have the right to talk to a lawyer before answering any of our questions **and at any time during questioning.** If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

(Additions in bold.)

I have every faith that law enforcement agencies have the ability to administer Miranda warnings that accurately reflect the law, and most of the agencies throughout the State already have adequate warnings. The widespread use of Miranda warnings that fully inform a person of his or her right to an attorney during questioning demonstrates that this Court's decision to mandate such a warning does not "unnecessarily burden" the proper investigation of crimes, but is a minimal obligation on the part of law enforcement that ensures that the purposes of Miranda and the Fifth Amendment rights protected by Miranda are fulfilled. As for those law enforcement agencies that create new versions of the warning that might misstate the law, I would urge that the Attorney General or some other statewide law enforcement organization work to create standard Miranda forms for use by police departments throughout the state that will withstand legal scrutiny.

Also, Justice Wells concludes that the Court's holding "is at most an extreme technical adherence to language and ... has no connection with whether the person who confessed understood his or her rights." However, the adequacy of the language in a Miranda warning is directly related to an accused's awareness of his or her rights, and necessarily, his or her ability to fully understand them. In Miranda, the Supreme Court held "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation," and "[o]nly through such a warning is there ascertainable assurance that the accused was aware of this right." 384 U.S. at 471-72.

Many outside the judiciary might call the requirements of the Constitution, especially the Fourth and Fifth Amendments, merely "technical." But the rights guaranteed in the Bill of Rights were deemed necessary at the founding of this country to ensure the rights of all individuals. Because Fourth and Fifth Amendment issues are most often raised by a defendant in a criminal proceeding, these opinions are never "popular." However, all of us in the justice system must be ever vigilant to never sacrifice the basic values in the Constitution for the sake of expediency; otherwise, we run the risk of slowly but surely eroding the very principles that have been the foundation of this democracy. As Justice Lewis expressed in a recent opinion from this Court:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient, or when expediency dictates otherwise, is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our government.

Baptiste v. State, 33 Fla. L. Weekly S662, S668 (Fla. Sept. 18, 2008) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957)). For all these reasons, I fully concur in the majority opinion.

ANSTEAD and LEWIS, JJ., concur.

WELLS, J., dissenting.

I dissent from the decision of the majority. I would quash the decision of the Second District Court of Appeal in Powell v. State, 969 So. 2d 1060 (Fla. 2d DCA 2007), and adopt the view of the seven members of the Second District in M.A.B. v. State, 957 So. 2d 1219 (Fla. 2d DCA 2007), who would hold that the warnings given in these cases adequately advise defendants of their Miranda[11] rights.

I believe that the majority stretches the plain language of the warning given in this case and ignores the simple, straight-forward requirements for a warning set out in Miranda. The majority needlessly complicates the Miranda warning requirements to reach its conclusion that the warning read to Powell was inadequate.

The consent form used in this case specifically and plainly advised, "You have the right to talk to a lawyer before answering any of our questions." (Emphasis added.) I agree with the majority that the sufficiency of Miranda warnings must be reviewed from the perspective of "a person of ordinary intelligence and common understanding." Majority op. at 18 (citing Missouri v. Seibert, 542 U.S. 600, 615-14 (2004) ("[S]ince a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.")). However, contrary to the majority, I find that it is patently unreasonable to construe the statement at issue as conveying a meaning other than: you can talk

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11 Miranda v. Arizona, 384 U.S. 436 (1966).

to a lawyer before answering any of law enforcement's questions. To hold this warning inadequate under Miranda is to give only lip service to the United State Supreme Court's repeated statement that the relevant "inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth v. Eagan, 492 U.S. 195, 203 (1981) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)). The warning in this case stated that a suspect has a right to talk to an attorney before answering any question. I would find that the use of the phrase "any of our questions" was sufficient to "reasonably convey" to a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation. It is unreasonable to conclude that the broad, unqualified language read to Powell would lead a person of ordinary intelligence to believe that he or she had a limited right to consult with an attorney that could only be exercised before answering the first question posed by law enforcement.

In addition, I agree with the plurality from M.A.B. that the final sentence of the warnings used in these cases ensures that the Miranda warning "avoids the implication—unreasonable as it may be—that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." M.A.B., 957 So. 2d at 1227. This final sentence informs suspects, "You have the right to use any of these rights at any time you want during this interview." The previously listed rights consist of the right to remain silent, the right to talk to a lawyer before answering any questions, and the right to have an attorney appointed without cost before any questioning. Again, I find that it is patently

unreasonable to conclude that a person of ordinary intelligence would interpret this invitation to use "any of these rights at any time you want during this interview" (emphasis added) to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement. The totality of the warning reasonably conveyed to Powell his continuing right of access to counsel.

Finally, I do not join the majority's decision because it expands upon the Miranda warning criteria set by the Supreme Court, resulting in an extreme, unworkable application of the Miranda decision. This needless complication is contrary to the spirit of the Supreme Court's decision, in which it stated that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." 384 U.S. at 481. The majority's decision to require overly detailed Miranda warnings will unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel. Additionally, it will result in reversing the convictions of individuals who have confessed to crimes based upon a holding that is at most an extreme technical adherence to language and that has no connection with whether the person who confessed understood his or her rights.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 2D05-646

(Hillsborough County)

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PETITIONER'S BRIEF

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(3)

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

Case No. 08-1175

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA
Petitioner,
v.
KEVIN DEWAYNE POWELL
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

WHETHER THE LACK OF ANY EXPRESS ADVICE CONCERNING THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATES *MIRANDA* WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING" AND (B) CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING. (RESTATED).

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In the Supreme Court of the United States

No. 08-1175

STATE OF FLORIDA
Petitioner,

v.

KEVIN DEWAYNE POWELL
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as *State v. Powell*, 998 So. 2d 531 (Fla. 2008). (JA 150-181).

The opinion of the Florida District Court of Appeal, Second District, is reported as *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007). (JA 133-149).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion on September 29, 2008, and issued a revised opinion on December 23, 2008. On June 22, 2009, the State of Florida's petition for writ of certiorari was granted by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF FACTS

Respondent, Kevin Dewayne Powell, was charged by information and convicted of felon in possession of a firearm (a loaded nine millimeter

handgun hidden under a bed), on August 10, 2004, in Hillsborough County, Florida. (JA 134, 151-152).

Tampa Police Officer Augeri testified at trial that Powell was arrested and taken to the police department, where he was advised of his *Miranda*[1] warnings. (JA 152). The following warnings given to Powell were contained on the Tampa Police Department Consent and Release Form, which was signed by Powell and received into evidence:

> You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

(JA 3).

Officer Augeri testified Powell willingly agreed to talk with them, and Powell admitted the firearm was his. Defense counsel objected at trial to the validity of the *Miranda* warnings on the basis that the standard form provides that the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant has the right to have an attorney present before questioning, but not *during*. (JA 24). The trial court overruled the objection, stating, "I think it's already been said that they have the right to question, have an attorney present right before any questioning and you can have one appointed for you so I'm going to overrule the objection." (JA 28).

Officer Augeri testified that Powell confessed that he owned the firearm and carried it for protection. Powell knew that as a convicted felon he was not permitted to carry a firearm. Powell was neither threatened nor coerced in any way to give his statement. (JA 24, 29). Powell testified at trial and admitted he had been convicted of ten prior felonies, as well as one crime involving dishonesty. (JA 86-87). Powell acknowledged he signed the waiver of his rights form and consented to be interviewed. Defense counsel specifically inquired as follows:

> DEFENSE ATTORNEY: You waived the right to have an attorney present during your questioning by detectives; is that what you're telling this jury?
> RESPONDENT: Yes.

(JA 80).

The jury found Respondent guilty of the charge of felon in possession of a firearm. (JA 134).

STATEMENT OF CASE

Respondent appealed his convictions and sentences to the Florida District Court of Appeal, Second District, arguing the *Miranda* warnings he was given were deficient pursuant to the Fifth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.

In *Powell v. State*, 969 So. 2d 1060 (Fla. Dist. Ct. App. 2007), two judges of a three-judge panel of the Second District Court of Appeal agreed and reversed Powell's conviction and remanded the case for further proceedings. (JA 148). Judge Kelly, concurring in part and dissenting in part, observed:

> Properly framed, the test for reviewing the adequacy of the warnings provided by law enforcement to an individual taken into custody "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)). In my view, Mr. Powell was not deprived of any information essential to his ability to knowingly waive his Fifth Amendment privilege against self-incrimination, and in particular, his

> right to have counsel present during questioning. Because the warnings, in their totality, "touched all of the bases required by *Miranda*," I respectfully dissent from the majority opinion to the extent that it holds otherwise. *See id.* at 203, 205. (JA 148).

In *State v. Powell*, 998 So. 2d 531 (Fla. 2008), the Supreme Court of Florida affirmed, holding the *Miranda* warnings informing a defendant he had the right to talk with a lawyer before questioning, and that he could use that right at any time during the interview, were insufficient to inform him of his right to have counsel present during questioning as required by the principles espoused in the Court's decision in *Miranda* and the protections given by the Fifth Amendment. (JA 174). Justice Wells' dissent in *Powell* articulates the problem: "I believe that the majority stretches the plain language of the warning given in this case and ignores the simple, straight-forward requirements for a warning set out in *Miranda*. The majority needlessly complicates the *Miranda* warning requirements to reach its conclusion that the warning read to Powell was inadequate." *Id.* at 544.

Justice Wells further concluded:

> The warning in this case stated that a suspect has a right to talk to an

attorney before answering any question. I would find that the use of the phrase "any of our questions" was sufficient to "reasonably convey" to a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation. It is unreasonable to conclude that the broad, unqualified language read to Powell would lead a person of ordinary intelligence to believe that he or she had a limited right to consult with an attorney that could only be exercised before answering the first question posed by law enforcement.

In addition, I agree with the plurality from *M.A.B.* that the final sentence of the warnings used in these cases ensures that the *Miranda* warning "avoids the implication - unreasonable as it may be - that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." *M.A.B.*, 957 So. 2d at 1227. This final sentence informs suspects, "You have the right to use any of these rights at any time you want during this interview." The previously listed

> rights consist of the right to remain silent, the right to talk to a lawyer before answering any questions, and the right to have an attorney appointed without cost before any questioning. Again, I find that it is patently unreasonable to conclude that a person of ordinary intelligence would interpret this invitation to use "any of these rights at any time you want during this interview" (emphasis added) to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement. The totality of the warning reasonably conveyed to Powell his continuing right of access to counsel.

State v. Powell, 998 So. 2d 531, 544-545 (Fla. 2008) (Wells J., dissenting). (JA 179-180).

SUMMARY OF THE ARGUMENT

Miranda requires that an accused be advised of the right to a lawyer before the initiation of custodial interrogation, which was done below. The warnings advised that Powell had the right "to talk to a lawyer before answering any of our questions" and that he would be provided with one "without cost and before any questioning." He was further told that he had the right to "use any of these rights at any time you want during this interview."

A person of ordinary intelligence would understand that he had a continuing right of access to his counsel and would be entitled to consult with his lawyer during questioning, not just immediately prior thereto.

The holding of the Supreme Court of Florida, that a suspect must be *expressly* advised of his right to counsel during questioning, is neither compelled nor required by *Miranda* and the Fifth Amendment of the United States Constitution. The Court has consistently held that no specific recitation of the warnings is necessary to satisfy the strictures of *Miranda*.

The warnings in this case reasonably convey *Miranda* rights as required by the Court. The Florida Supreme Court's holding to the contrary unjustifiably expands *Miranda* and erroneously finds that the omission of any express advisement to the right to counsel during questioning fails to satisfy constitutional standards.

ARGUMENT

WARNINGS THAT ADVISE OF THE RIGHT TO REMAIN SILENT, THE RIGHT TO TALK TO A LAWYER BEFORE QUESTIONING, AND THE RIGHT TO USE ANY OF THESE RIGHTS AT ANY TIME DURING QUESTIONING REASONABLY CONVEY THE PROCEDURAL SAFEGUARDS ENUNCIATED IN *MIRANDA*.

The Supreme Court of Florida has improperly expanded this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), by requiring law enforcement to expressly advise suspects they have the right to have counsel present during custodial interrogation. The impact of this expansive misinterpretation of *Miranda* places an unnecessary and onerous burden on law enforcement officials and continues to have a chilling effect on the admissions of otherwise voluntary confessions.

A. *Miranda* Requires that the Warnings Given be Reasonably Conveyed.

Over 40 years ago the *Miranda* Court established procedural safeguards to protect an individual's rights under the Fifth Amendment before law enforcement could commence custodial interrogation. The Court mandated that law enforcement, prior to questioning, must advise a person that, "he has the right to remain silent, that

any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

The Court recognized that, while an individual's rights exist, society has an interest in the safety of its citizens in the prosecution of criminals and the ability of the prosecution to utilize otherwise voluntary statements in judicial proceedings. To balance these equally important interests the Court did not require that law enforcement recite the warnings verbatim from *Miranda* as long as the rights were "reasonably conveyed" to the person being questioned. *Duckworth v. Eagan*, 492 U.S. 195 (1989).

Prior to *Miranda*, courts employed the due process clauses of the Fifth and Fourteenth Amendments and a totality of the circumstances test to determine if a confession was compelled or voluntarily given. *See e.g., Brown v. Mississippi*, 297 U.S. 278 (1936). In *Miranda*, the Court recognized the difficulty of applying such a test to determine the voluntariness of a statement holding that the Fifth Amendment's privilege against self-incrimination clause was the touchstone for determining the admissibility of a statement obtained through custodial interrogation.

As part of the system for protecting this constitutional privilege, the Court established that

individuals are entitled to consultation with an attorney prior to questioning and to the presence of an attorney during interrogation. Along with other procedural safeguards this information must be effectively communicated to the individual. *Miranda*, 384 U.S. at 470.

The Court never intended to unduly burden the police by mandating that particular words be used in conveying the meaning of *Miranda's* protections. In fact, the Court has steadfastly counseled against any requirement for a recitation of "magic words" to satisfy the Court's holding. *Miranda* does not require of, nor impose upon, the courts or law enforcement a rigid and precise formulation of the warnings given a criminal defendant. *California v. Prysock*, 453 U.S. 355 (1981). To avoid tipping the delicate balance struck by *Miranda*, the Court recognized that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." *Miranda*, 384 U.S. at 481.

Miranda and its progeny merely require that the warnings given "adequately convey" the protections enunciated therein. In *Prysock*, the Court accepted review of a case involving application of precedent to a set of facts. There, the lower court's opinion improperly set forth a "flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise

language contained in the *Miranda* opinion." The Court held "such a rigid rule was not mandated by *Miranda* or any other decision of this Court, and is not required to serve the purposes of *Miranda." Prysock*, 453 U.S. at 356. In finding the warnings given adequately conveyed a right to counsel in conjunction with the pending interrogation, the Court held, "... nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning.'" 453 U.S. at 360-61.

As explained by the Court, these "prophylactic" *Miranda* warnings are not themselves rights protected by the Constitution, but are measures set out to insure that the right against compulsory self-incrimination is protected. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

Nor were *Miranda's* procedural safeguards intended to create a "constitutional straightjacket." *Miranda*, 384 U.S. at 467. Simply put, "the Constitution does not require police to administer the particular *Miranda* warnings," as long as the procedure used effectively protects the privilege against self-incrimination. *Dickerson v. United States*, 530 U.S. 428, 440 n.6 (2000).

In *Miranda*, the Court found the warnings used by the FBI were sufficient to provide a reasonable person a meaningful understanding of their rights. In citing these warnings with approval, the Court stated:

> Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.

Miranda, 384 U.S. at 483-84.

Despite the absence of any reference to the right to have counsel present during questioning, the Court stated that, "...the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today." *Id.* at 483-84.

Although the reasons for the protections afforded by *Miranda* warnings have remained, the

language used in advising a suspect of his rights has evolved over time as our society has changed and advanced. Because the warnings are given in various circumstances it is important flexibility exists to accommodate a variety of different scenarios. For instance, considering custodial interrogations are not limited to the station house, "and the officer in the field may not always have access to a printed *Miranda* warning, or he may inadvertently depart from routine practice," reviewing courts need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (courts should consider if the language is adequate to safeguard the right not to incriminate oneself).

Unsurprisingly, given today's daily bombardment of information and spur of the moment media, *Miranda* warnings have become such a routine part of law enforcement procedures that over the past four decades they have become a part of our national culture. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). Any good police officer on the television beat would be remiss if he did not "Mirandize" a suspect before questioning, evidencing that, under the "reasonably convey" analysis, *Miranda* warnings have been assimilated into our society. *See* Merriam-Webster's Online Dictionary, Main Entry: Mi·ran·dize, Pronunciation: \mə-'ran-ˌdīz\, Function: transitive verb, Inflected Form(s): Mi·ran·dized;

Mi ran diz ing, Date: 1984,: to recite the *Miranda* warnings to (a person under arrest).

Thus, the warnings and the reasonably convey standard should only be examined through this more modern day lens. Given a common sense perspective, the inquiry as to whether the warnings given to Respondent[2] *reasonably convey* to a suspect of ordinary intelligence his rights must be answered in the affirmative.

B. The Warnings at Issue Reasonably Convey the Right to Have Counsel During Questioning.

The warnings in this case, when read in context, adequately convey one's rights pursuant to *Miranda* including the right to have counsel present prior to and during questioning. Although not absolutely perfect or the most elegant formulation of the warnings, *Miranda* itself neither demanded nor indicated any "talismanic incantation was required to satisfy its strictures." *Prysock*, 453 U.S. at 359. The requirement to inform a suspect of his rights could be satisfied not

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[2] "You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." (JA 3).

only by the precise warnings delineated in *Miranda* but also by "a fully effective equivalent." *Id.* at 476.

By failing to consider the warnings in their entirety, the Supreme Court of Florida and other like-minded courts, e.g., those cited in fn. 6, *infra.*, have embraced a hypertechnical approach by concentrating on the words used in isolation and not their meaning as a whole. This approach mires the common sense reasoning of this Court by engaging unnecessarily in semantics. Consequently, *Miranda* has been rendered unworkable by various courts' utilization of an overly rigid application of its holding. *Dickerson v. U.S.*, 530 U.S. 428, 463 (2000) (Scalia, J., dissenting).

Warnings, such as those given to Powell, accomplish the critical function of conveying to an individual of average intelligence:

> (1) that the giving of a statement to the police can have serious legal consequences, (2) that the person is not obligated to provide the statement, (3) that the matter is serious enough that the person may need to consult with a lawyer, and (4) that the State will provide a lawyer upon request and without continuing questioning if the person indicates he wants one and cannot afford one.

Mitchell v. State, 2 So. 3d 287 (Fla. Dist. Ct. App. 2007) (Altenbernd, J., concurring).

Powell was first warned of his right to remain silent, right to speak with a lawyer before questioning, right to appointed counsel if he could not afford one, and that he could exercise any of these rights during questioning. Reading these advisements as a whole to a person of ordinary intelligence can only lead to the common sense conclusion that one's rights were adequately conveyed.

In *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996), Frankson contended that the warnings given were deficient because they did not convey a right to have counsel present during interrogation. The Fourth Circuit reasoned that the officer's notification to the defendant that he had a right to an attorney was sufficient, and the officer need not have specified the right to an attorney applied both prior to and during interrogation. In finding the warnings provided to Frankson communicated that his right to an attorney began immediately and continued forward in time without qualification, the court postulated:

> *Miranda* and its progeny simply do not require that police officers provide highly particularized warnings. Such a requirement would pose an onerous burden on police officers to accurately

> list all possible circumstances in which *Miranda* rights might apply. Given the common sense understanding that an unqualified statement lacks qualifications, all that police officers need do is convey the general rights enumerated in *Miranda*.

Frankson, 83 F.3d at 82.[3]

In *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), the Second Circuit found sufficient *Miranda* warnings that did not specifically inform a suspect of his right to counsel during questioning, but did inform him of his right to remain silent and to refuse to answer questions. Lamia was told that if he did not have an attorney one would be

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[3] Other Federal Circuit courts have found *Miranda* warnings that did not specifically advise a suspect of his right to have an attorney present *during* interrogation were sufficient. For example, in *United States v. Caldwell*, 954 F.2d 496, 500-04 (8th Cir. 1992), the Eight Circuit observed that "the general warning that [the defendant] had the right to an attorney, which immediately followed the warning that he had the right to remain silent, could not have misled [the defendant] into believing that an attorney could not be present during questioning." *See also United States v. Cusumano*, 429 F.2d 378 (2d Cir. 1970), and *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982). The Seventh Circuit, in *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973), held that a suspect had been Mirandized effectively despite the fact that the warnings he received did not inform him of his right to have an attorney present during questioning.

provided without cost, and that anything he said could be used against him in court.

The court in *Lamia* correctly discerned that Lamia had been told without qualification of his right to an attorney and that one would be appointed if he could not afford one. In viewing the statement in context, in which Lamia was just informed he did not have to make any statement to the agents, Lamia was effectively warned that he need not make any statement until he had the advice of an attorney. *Lamia*, 429 F.2d at 376-77.

Lamia has been cited with approval by the Court for the analysis that it never intended to invoke a "rigidity" in the form of the warnings, as the warnings in *Lamia* did not expressly state the right to the presence of counsel during questioning. *Prysock*, 453 U.S. at 359.[4]

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[4] Other state and federal courts have upheld warnings in which the suspect was advised that he had the right to consult with an attorney prior to any questioning. In *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972), the court found such warnings reasonably conveyed his rights under *Miranda* because it was, "unreasonable to assume ... that [the defendant] would not have requested the [p]resence of an attorney while he answered the police officer's questions." *See also United States v. Vanterpool*, 394 F.2d 697, 699 (2d Cir. 1968) (validity of *Miranda* warnings upheld where defendant was advised he had the right to consult with a lawyer, "at this time"); *United States v. Anderson*, 394 F.2d 743, 746-47 (2d Cir. 1968) (defendant advised he had right to attorney at that time was considered sufficient warning pursuant to *Miranda*).

Here, in holding the warnings given to Powell were inadequate, the Supreme Court of Florida has misapplied the Court's "reasonably convey" and "fully equivalent" standards. The Florida court[5] and others in expanding *Miranda*,[6]

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[5] Indeed, another Florida case is pending in this Court. *Florida v. Rigterink*, 129 S.Ct. 1667 (2009). In both *Rigterink* and the instant case, the warnings were read from a card containing similar verbiage even though the cases arose in different Florida jurisdictions. Law enforcement agencies in both jurisdictions have, subsequent to the Florida *Powell* opinion, conformed the language set forth on their warnings card to the dictates of that opinion. Nevertheless, the issue before this Court remains extant and requires resolution despite the change in language. Officers in the field may not read the card *verbatim* or may not have the card accessible in every scenario. The conflicts in decisional case law identified in the certiorari petition filed in the instant case highlight the need for this Court to resolve the question presented herein.

[6] Notwithstanding this Court's repeated instruction that *Miranda* warnings need only adequately convey one's rights, the Fifth, Sixth, Ninth and Tenth Circuits have taken a hypertechnical approach to *Miranda* by requiring that a suspect be expressly informed of the right to have an attorney present during questioning. *See Windsor v. United States*, 389 F.2d 530, 533 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 137, 140-42 (6th Cir. 1992); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981); *Atwell v. United States*, 398 F.2d 507 (5th Cir. 1968); *But see Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), *cert denied*, 548 U.S. 909 (2006)(warnings that informed a defendant he had the right to presence of counsel prior to questioning but did not

have gone beyond what the Court intended in holding no specific recitation of the warnings is necessary or mandated.

The failure to expressly advise a suspect that he has the right to have an attorney present during questioning does not render *Miranda* warnings constitutionally deficient when, collectively, the warnings made this right clear. To suggest otherwise actually dilutes the purpose of *Miranda*. The right to an attorney is absolute if a suspect unequivocally requests the assistance of a lawyer. Parsing through a litany of circumstances such as while the police are in or out of the interrogation room, or during questioning, merely describes an event or circumstance and adds a qualifier to an absolute.

C. The Florida Supreme Court's Opinion Improperly Expands Miranda, Burdens Law Enforcement and Unjustifiably Suppresses Otherwise Valid, Voluntary Confessions.

Courts which, contrary to *Miranda's* intent, are requiring law enforcement to expressly advise a defendant they have the right to have counsel present *during* custodial questioning, are demanding more from law enforcement than the

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explicitly advise of right to counsel during questioning were adequate and not an unreasonable application of federal law requiring federal habeas relief).

Court ever envisioned or deemed necessary. From a practical viewpoint, these courts are unjustifiably suppressing otherwise valid, voluntary confessions and unnecessarily excluding critical evidence. The "[a]dmissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (*quoting Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

It contorts reasoning to suggest the warnings given to Powell do not reasonably convey his right to have an attorney[7] present during questioning. "Only based on a strained, literalistic reading" could the warnings given to the defendant be interpreted as implying that he "could talk to a lawyer before questioning and at any time during questioning but could not have a lawyer present during questioning." *M.A.B. v. State*, 957 So. 2d 1219, 1228 (Fla. Dist. Ct. App. 2007) (Canady, J., concurring) (assessing these identical warnings). Importantly the *Miranda* language in this case and others, which do not require a suspect be expressly advised of his right to counsel during interrogation,

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[7] In this case, the Florida court reversed where no error occurred. Powell never unequivocally exercised his right to an attorney; therefore, it begs the question how any failure to specifically inform him that he had a right to an attorney during questioning would have made any difference to Powell's exercise of a known right to an attorney.

meets the reasonable clarity test because the warnings do not suggest that "the right of access to counsel is limited to a lawyer who is not physically present, nor that the right to counsel is inapplicable during interrogation." *Id.* at 1228.

In this case, it is clear that the police did not employ improperly coercive tactics to garner Powell's confession, nor has such an allegation been made. The police officer used a standard printed rights form which was read to Powell and that Powell read and signed. Powell indicated he understood his rights and voluntarily waived them.

While *Miranda* helps to ensure confessions are given voluntarily, exclusion of non-coerced statements made to police where the suspect is not expressly advised of his right to an attorney's presence *during* interrogation, when he did not seek to exercise his right to an attorney, exceeds what is necessary to safeguard a suspect's Fifth Amendment privilege and incurs unnecessary societal costs. Derek Bottcher, *Bridgers v. Dretke: Not Everything You Say Can and Will be Used Against You*, 18 Geo. Mason U. Civ. Rts. L.J. 359, 383-384 (2008).

For example, consider the untenable result here. To protect against the danger of coercion inherent in custodial interrogation, *Miranda* created a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for

purposes of the prosecution's case in chief. *United States v. Patane*, 542 U.S. 630, 639 (2004). However, an otherwise voluntary confession which follows an arguably incomplete warning should not be treated the same as a complete failure to comply with *Miranda*. Telling Powell he had a right to an attorney during questioning would have done nothing to quell the danger of coercion inherent in a custodial interrogation. Indeed, had Powell exercised his right to an attorney it would be incredible to suggest that an attorney would have been squired out the door once questioning began.

Evidence and unrebutted testimony establishes that Powell's statement was voluntary. The evil addressed by *Miranda* and its progeny is the coercion of involuntary confessions, not the inducement of voluntary confessions. In *Oregon v. Elstad*, 470 U.S. 298, 304 (1985), citing *United States v. Washington*, 431 U.S. 181, 187 (1977), the Court observed that far from being prohibited by the Constitution, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable."

Powell was advised of his right to counsel prior to answering questions, a right he declined to exercise. Powell testified he understood his rights and voluntarily waived them. Powell was clearly and fully advised of his right to remain silent and

the implications of waiving that right.[8] Because the statement is otherwise voluntary, there is simply no police misconduct to deter.[9]

The procedural safeguards articulated in *Miranda* only require an officer "reasonably" convey warnings that inform a suspect of his "right to the presence of counsel," or you have the "right to talk to a lawyer" or the "right to a lawyer's help." The

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[8] The constitutional underpinning of *Miranda* emanates from the Fifth Amendment, which protects a suspect's privilege against compelled self-incrimination. Thus, the right to remain silent and the ramifications of waiving that right [use in a court of law] appear to be the most critical part of the warning. *Cf. Moran v. Burbine*, 475 U.S. 412, 431 (U.S. 1986)(where this Court reiterated that the right to counsel only attaches upon the initiation of adversary proceedings by the State, not initiation of interrogation of a criminal suspect). There is no dispute that this right was clearly communicated to Powell in this case.

[9] In this case, and other cases presenting similar factual circumstances, suppression exacts a harsh penalty upon the prosecution and represents an undeserved windfall for the criminal defendant. Consequently, suppression of an otherwise voluntary statement is not the appropriate remedy for an arguably imperfect *Miranda* warning in the absence of police misconduct. *See generally Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009) ("We think that the marginal benefits of Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering society's compelling interest in finding, convicting, and punishing those who violate the law[.]" (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (U.S. 1986)). **Michigan v. Jackson*, 475 U.S. 625 (1986).

test is whether the words used adequately convey an individual's rights to him. The warnings in context must be considered in making such a determination, because there is no bright-line test which can be applied in all circumstances. An officer must have the flexibility of language and circumstance to convey the essence of the warnings to an individual. *Miranda* requires no more.

As aptly observed by Justice Wells in his dissent in *Powell*:

> Finally, I do not join the majority's decision because it expands upon the *Miranda* warning criteria set by the Supreme Court, resulting in an extreme, unworkable application of the *Miranda* decision. This needless complication is contrary to the spirit of the Supreme Court's decision, in which it stated that the "limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." 384 U.S. at 481, 86 S.Ct. 1602. The majority's decision to require overly detailed *Miranda* warnings will unduly and unnecessarily burden the proper investigation of crimes without meaningfully increasing a suspect's understanding of the right to counsel.

> Additionally, it will result in reversing the convictions of individuals who have confessed to crimes based upon a holding that is at most an extreme technical adherence to language and that has no connection with whether the person who confessed understood his or her rights.

State v. Powell, 998 So. 2d 531, 545 (Fla. 2008) (Wells J., dissenting). (JA 180).

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits the decision of the Supreme Court of Florida should be reversed.

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RESPONDENT'S BRIEF

No. 08-1175

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

KEVIN DEWAYNE POWELL.

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

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QUESTIONS PRESENTED

1. Whether a decision by this Court addressing federal *Miranda* warning standards would be advisory since the Florida Supreme Court clearly and explicitly based the decision below on the independent and adequate alternative ground that the warnings at issue here violated the Florida Constitution.

2. Alternatively, whether the Florida Supreme Court correctly held – in accordance with every federal court of appeals considering the issue on direct review – that advising of "the right to *talk to* a lawyer *before* answering any of our questions" fails clearly to convey a suspect's right to the *presence* of counsel *during* questioning because it misleadingly suggests a limit on the suspect's unfettered right to have counsel present both before and during a custodial interrogation.

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INTRODUCTION

This case presents a narrow question concerning the sufficiency of a printed *Miranda* warning form developed and used by the Tampa Police Department and read verbatim to Respondent Powell in an interrogation room at the stationhouse after his arrest.

Over forty years ago, this Court in *Miranda v. Arizona* concluded that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ." 384 U.S. 436, 471 (1966). As the Court has reiterated on numerous occasions since, "[t]he rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.*, 442 U.S. 707, 717 (1979). Just last Term, this Court emphasized that *Miranda* rights read to suspects "include the right to have counsel present during interrogation." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009). The Florida Constitution independently "requires that prior to custodial interrogation in Florida suspects must be told" of certain rights, including their "right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Traylor v. State*, 596 So. 2d 957, 966 & n.13 (Fla. 1992).

The Tampa police who interrogated Powell, however, did not advise him of his right to have counsel present "during" the interrogation. Nor did they advise Powell more generally of his "right to counsel" without qualification, as some jurisdictions allow. Rather, the form Tampa police read to Powell advised that he had "the right to talk to a lawyer *before* answering any of our questions." JA 3 (emphasis added).

The Florida Supreme Court did not err in finding that "the warning was misleading. . . . The 'before questioning' warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning." JA 171. To the contrary, the decision reflects a straightforward application of Florida law. *See Traylor*, 596 So. 2d at 966 n.13. Furthermore, every federal court of appeals considering the issue on direct review has found comparable warnings defective under *Miranda*. It also appears that the *Miranda* forms used by virtually every federal, state, and local law enforcement agency in the country satisfy the standards applied in the decision below.

Petitioner would have the Court undo settled law in this area, inviting law enforcement agencies to depart from the valid warning forms currently used in most jurisdictions. The attendant costs would include potential confusion on the part of law enforcement officers, renewed litigation, and dilution of *Miranda*

protections. The Florida Supreme Court was right to conclude that the form here was at odds with *Miranda*. And it was right to hold that the form independently violated Article I, Section 9 of the Florida Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9 of the Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. *Factual Background.* On August 10, 2004, detectives and uniformed officers of the Tampa Police Department entered the housing project apartment of Shazeena West, Respondent Powell's girlfriend. JA 19-20, 30-33. At the time, at least four adults were present in the apartment, including Powell. JA 34-36. The police searched the apartment and discovered a gun underneath the bed in a bedroom that Powell appeared to have been coming out of. JA 20-21. Powell did not live in Ms. West's apartment, JA 30-31, 70, and nothing in the apartment linked him to the gun. JA 49-50, 59-61. The police arrested Powell and took him to a cramped interrogation room at the stationhouse. JA 48-49. There, he was questioned by the police. JA 49-50.

The officers read Powell the following warnings from the April 2001 version of the Tampa Police Department's Consent and Release Form 310, JA 3, 24-27, 62-63:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

JA 3.

The warning form did not state that Powell had the right to have counsel present with him during the interrogation. JA 3. Rather, it stated that Powell could "talk to" an attorney "before answering any of our questions." JA 3.

Powell signed the Form 310. JA 62-63, 79-80. He then stated that the gun found under the bed was his. JA 28-29, 64.

At the January 2005 trial, the government used Powell's self-incriminating statements against him. JA 28-29, 64. Before his statements tying him to the gun were introduced, Powell's attorney objected that they were inadmissible because the police had advised Powell only of his right to counsel before questioning, and not during the interrogation. JA 3, 24-28; *see also* JA 63-65 (renewing objection). The judge overruled the objections. JA 28, 63-64.

Both interrogating officers then testified that Powell confessed to owning the gun. JA 28-29, 64. The government presented no fingerprint or other forensic evidence. JA 45-46. Powell's statements were the only evidence at trial connecting him to the firearm.

Powell took the stand and testified that the statements he had made about owning the gun were not true. JA 80-81. He did not own the gun and did not know that it was under the bed in the apartment. JA 78-79, 94. He testified that before the interrogation, the police showed him the gun and told him that if he did not confess to owning it, his girlfriend would be charged: "The detectives told me

that my, my girlfriend would be charged with the possession of a firearm and that they would call the DCF to get her children take[n] away." JA 55; *accord* JA 59, 78, 80-86, 94-95. In addition, he said the police told him that because the gun was found in her apartment, his girlfriend and her three young children would be thrown out of public housing. JA 84-86. Likewise, he stated that he signed the form read to him and purportedly "waived" his rights because of those threats. JA 80.[1] On rebuttal, the police denied making any of these statements. JA 97.

---

[1] During the trial, Powell's lawyer asked him whether he "waived the right to have an attorney present during your questioning by detectives." JA 80. Petitioner wrenches this testimony out of context to suggest that, notwithstanding the form read to him, Powell had actual knowledge of his rights. Br. 4 (quoting JA 80). Considered in context, however, Powell's lawyer, who before asking the question had made explicit objections that the warnings given Powell failed to convey the right to counsel during interrogation, was not asking whether Powell had validly waived a known right. Rather, the portion of the transcript quoted by Petitioner was merely the foundation for questions by Powell's lawyer concerning *why* Powell signed the form and spoke with the police:

> Q. Please explain why to this jury you would sign this consent form admitting that this is and make statements to these detectives that this is your gun if in fact that statement was not true?
>
> A. Because of the threat they proceeded after my friend, girlfriend that they were going to try to charge her with the charge of possession of a firearm and take away her kids. . . .

JA 81.

The jury found Powell guilty of possessing a firearm as a convicted felon and he was sentenced to ten years in prison. JA 127-29, 131.

2. *The Warning Form at Issue.* The use of forms like the April 2001 version of Form 310 read to Powell, which contain language limiting the right to counsel to the period before interrogation, appears to be very much the exception rather than the rule. Recent studies found that nearly 96% of a sample of over 900 *Miranda* forms collected nationwide included language informing suspects of the right to have counsel present either during questioning or before and during questioning. *See* Richard Rogers et al., *The Language of* Miranda *Warnings In American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124, 133 table 7 (2008) [hereinafter Rogers et al.];[2] *see also* SG Br. 1, 13 n.4. This virtual consensus nationwide appears to be consistent with the trend in Florida as well. *See Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009) (per curiam) (noting that "the vast majority of Florida's law enforcement agencies already possess and provide adequate warnings . . . that fully inform a person of his or her right to an attorney prior to and

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[2] Professor Rogers published a code book that summarizes the content of the forms analyzed in the studies. *See* Richard Rogers & Daniel Shuman, *National Survey of* Miranda *Warnings, 2005-2006, Code Book*, Study 23100, Inter-university Consortium for Political and Social Research [hereinafter Rogers & Shuman], *available at* www.icpsr.umich.edu.

during questioning"), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229); *Roberts v. State*, 874 So. 2d 1225, 1227 (Fla. 4th Dist. Ct. App. 2004) (taking notice that 89 of 90 *Miranda* forms used in Florida "contained the warning that the accused is entitled to an attorney during questioning, or words to that effect").

3. *The Proceedings Below.* The Florida Second District Court of Appeal reversed Powell's conviction on the ground that the warnings read to him violated Article I, Section 9 of the Florida Constitution and *Miranda*:

> Because the *Miranda* warnings given to Mr. Powell contain limiting language as to "before questioning" and the right to consult with a lawyer, we hold such warnings failed to comply with state and federal constitutional requirements to adequately inform the accused of his or her right to have an attorney present throughout interrogation.

JA 138 (*Powell v. State*, 969 So. 2d 1060, 1063 (Fla. 2d Dist. Ct. App. 2007)). The court reasoned that "the language used by the police department in this case d[id] not rise to a functional equivalent of the required *Miranda* warning." JA 146. The court also found that the last sentence of the warning, stating that Powell had the "right to use any of these rights at any time you want during this interview," did not remedy the defect. JA 145. Petitioner sought review in the Florida Supreme Court, which accepted jurisdiction.

The Florida Supreme Court concluded that the warnings were defective because "[b]oth *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning." JA 174 (*State v. Powell*, 998 So. 2d 531, 542 (Fla. 2008)). The court recognized that the Florida Constitution and *Miranda* give a suspect a right to the presence of counsel not just before interrogation, but also during. It determined that, under the Florida Constitution, police must convey to suspects the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. JA 157-58. The court also recognized that "there is no talismanic fashion in which [warnings] must be read or a prescribed formula that they must follow, *as long as the warnings are not misleading*." JA 171 (quotation source omitted) (emphasis in original).

Based on the above, the court held that advising a suspect of only the right to talk to an attorney before questioning was "misleading." JA 171. Telling suspects they have the right to talk with a lawyer before answering any questions "is not the functional equivalent of having the lawyer present with you during questioning." JA 170-71. The court further found that, when read as a whole, nothing in the form eliminated the misleading limitation. Specifically, the court rejected Petitioner's argument that the final sentence in Form 310, stating "[y]ou have the right to use any of these rights at any time you want during this interview," remedied the misleading nature of

the warning. JA 171-72. The court stated that this sentence did "not effectively convey to Powell his right to the presence of counsel before and during police questioning," because it "could not effectively convey a right the defendant was never told he had." JA 171.

Finally, the court rejected Petitioner's argument that a failure sufficiently to warn suspects of their rights could be cured where the suspect purportedly had "actual knowledge" of those rights. JA 172-73. The court concluded that delving into the subjective knowledge of defendants would be unduly speculative and defy the bright-line virtues of *Miranda*. JA 172-73.

Justice Wells dissented. JA 177-80. In his view, informing a suspect of the right to an attorney "before answering any of our questions" "reasonably conveyed" that the suspect could invoke his right to an attorney during the interrogation. JA 179. Justice Wells asserted that the statement in the warning allowing the defendant to use "any of these rights at any time" further "conveyed to Powell his continuing right of access to counsel." JA 179-80. Finally, he concluded that requiring police to use a different warning form would burden law enforcement. JA 180.

SUMMARY OF ARGUMENT

I. This Court should dismiss the writ of certiorari as improvidently granted because the decision below clearly and explicitly rests on independent and adequate state law grounds. The Florida Supreme Court held that Powell's statements to police were inadmissible because the warnings read to him were deficient under "article I, section 9 of the Florida Constitution." JA 174; *accord* JA 157-58, 164, 170. That holding is independent of the court's separate analysis finding the warnings invalid under *Miranda*. JA 174. As required by *Michigan v. Long*, the independence and adequacy of the state law ground here is "clear from the face of the opinion" and the Florida Supreme Court repeatedly made a "plain statement" that its decision rested on state law grounds. 463 U.S. 1032, 1040-41 (1983).

II. If the Court reaches the merits, it should affirm the decision below. The parties and amicus curiae all agree that suspects possess the right to have an attorney present *during* police interrogation. Br. 12; SG Br. 7-8. We all agree that *Miranda* requires police to convey this right to suspects. Br. 10-11; SG Br. 12. And we all agree that in determining whether a warning adequately conveyed this right, a reviewing court should focus on the substance of the warning and not demand the use of specific words. Br. 12, 16-17; SG Br. 18. Our disagreement concerns whether a warning that advises of a right to *talk to* a lawyer *before* questioning suffices to warn the suspect that he has the right to have the lawyer *present* with him *during* the interrogation.

The Tampa police who interrogated Powell did not explicitly advise him of his right to have a lawyer present "during" the interrogation. Nor did they advise Powell more generally of his "right to counsel," which several courts have found can sufficiently convey the right to counsel both before and during interrogation. Rather, the police – using a practice that has been rejected by virtually every court that has considered it – advised Powell only that he had "the right to talk to a lawyer *before answering any of our questions*." JA 3 (emphasis added).

The Florida Supreme Court correctly determined that the warning form was "misleading":

> The "before questioning" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

JA 171. Indeed, since 1968, federal courts of appeals uniformly have found that warnings advising only of the right to counsel "prior to" or "before" questioning convey an impermissible "restriction," "false limitation," or "qualification" on the suspect's access to counsel during interrogation. *See, e.g.*, *Windsor v. United States*, 389 F.2d 530, 533 (5th Cir. 1968). It appears that *every* federal court of appeals considering the issue on direct review has held that warnings like those here are deficient under *Miranda*.

In line with this longstanding jurisprudence, it also appears that the *Miranda* forms used by virtually every law enforcement agency in the country satisfy the standards applied in the decision below. *See* Rogers & Shuman, *supra*, at 42-63. Of the more than 900 warning forms collected from 49 states and various federal law enforcement agencies, only *five* advise of a right to talk to a lawyer or to have the lawyer present "before questioning" without also articulating the right to counsel *during* interrogation. *Id.* at 42, 43, 48, 52. Of those five, all but one mention the right to have a lawyer "present." *Id.* at 48.

Contrary to Petitioner's view, the issue in this case is not one of form, but of substance. The Tampa Police Department could have conveyed the right to counsel using any number of formulations, provided that the warning included the required substance. Indeed, Florida courts have since held that generalized warnings such as "you have the right to the presence of an attorney" are sufficient to convey a suspect's right to counsel before and during interrogation because – unlike the warning given Powell – they do not misleadingly suggest any temporal limitation. *See, e.g.*, *State v. Smith*, 6 So. 3d 652, 653 (Fla. 2d Dist. Ct. App. 2009), *review denied*, 2009 WL 2989781 (Fla. Sept. 17, 2009).

In the face of all this, Petitioner argues that the last sentence of the form read to Powell cured any defect by providing, "[y]ou have the right to use any of these rights at any time you want during this

interview." The Florida Supreme Court correctly concluded that "[t]his last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed?" JA 172. Put simply, "a right that has never been expressed cannot be reiterated." *Id.*

Finally, affirming the decision below will not "unduly burden" law enforcement. Br. 12; *accord id.* 22, 27. Given the settled lower court jurisprudence and law enforcement practice, affirming the decision below will do little more than confirm the status quo. Reversing, by contrast, could impose substantial burdens on the criminal justice system. Under Petitioner's approach, law enforcement agencies would, in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), have incentives to modify their forms. That, in turn, would reignite litigation in this area and dilute the protections intended by the *Miranda* decision. Petitioner would risk all of this to defend a standardized form that the Tampa Police Department no longer uses, Br. 21 n.5, that Petitioner concedes is "arguably incomplete," Br. 25, and that the Solicitor General views as contrary to "sound law enforcement practice." SG Br. 9.

This Court should dismiss the writ of certiorari as improvidently granted or, alternatively, affirm the decision below.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE THE DECISION BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE CONSTITUTIONAL GROUNDS

A. The Florida Supreme Court Based its Decision on the Florida Constitution as Interpreted in *Traylor*

"This Court will not review a decision of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In *Michigan v. Long*, the Court explained that this jurisdictional bar applies where "the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion" or where the court below relies on federal law but "make[s] clear by a plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." 463 U.S. 1032, 1040-41 (1983).

A straightforward read of the decision below confirms that this standard is satisfied here. *First*, the decision below was, by its own terms, independently based on state grounds. This Court need go no further than the plain language of the decision to confirm this. The decision below unequivocally and repeatedly stated that it was based on *Miranda* and,

independently, on "article I, section 9 of the Florida Constitution" and *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). JA 174; *accord* JA 157-58 (under "article I, section 9 of the Florida Constitution, this Court in *Traylor* [], outlined the . . . rights Florida suspects must be told of prior to custodial interrogation [including] 'the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.'"); JA 170 ("Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor* [], a defendant has a right to lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation."); JA 164 ("In [*Ramirez/Sapp*] we noted the requirements of both the Fifth Amendment, as explained in *Miranda*, and the Florida Constitution, as explained in *Traylor*. Our explanation of the federal and the state requirements included the requirement that a suspect be informed of the right to have counsel present during questioning.").

Reflecting that the Florida Supreme Court meant what it said, the decision below contained discrete sections separately analyzing federal law and Florida law. Before analyzing the warnings given Powell, the Florida Supreme Court first discussed general federal standards, JA 155-57, and then Florida constitutional standards. JA 157-58. It included sections separately addressing federal case law requirements under *Miranda*, JA 161-63, and Florida case law concerning the requirements independently imposed by the Florida Constitution. JA 164-69. The court then

addressed these separate standards as applied to the warnings given Powell. JA 169-73. The court concluded that "[b]oth *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning" and that the warnings here were invalid. JA 174.

Beyond the plain language and analysis of the opinion, Florida's principle of primacy confirms that the decision below was based on independent state grounds. "When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution. . . ." *Traylor*, 596 So. 2d at 962. Thus, by design, the decision below accorded primacy to state constitutional grounds even though finding the warnings here deficient on both state and federal grounds. JA 174.

Were all this not enough, earlier this year the Florida Supreme Court confirmed that the decision below is based on state law grounds. The court followed *Powell* and emphasized *Traylor*'s holding that "*the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires* that prior to custodial interrogation in Florida suspects must be told that they have . . . the right to consult with a lawyer *before* being interrogated *and* to have the lawyer present *during* interrogation." *Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009) (per curiam) (quoting and adding emphasis to *Traylor*, 596 So. 2d at 965-66 & n.13),

petition for cert. filed, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229).

Second, the state law grounds are adequate. Over seventeen years ago in *Traylor*, the Florida Supreme Court held that, based on "Florida law and the experience under *Miranda* and its progeny, . . . to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told" of certain rights. 596 So. 2d at 965-66. One of those rights is "the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Id.* at 966 n.13.

In regard to federal requirements under *Miranda*, *Traylor* noted that this Court "established procedural safeguards similar to those defined above." *Id.* at 965 n.12; *see also Almeida v. State*, 737 So. 2d 520, 524-25 (Fla. 1999) (stating that *Traylor* guidelines are "similar to those announced in *Miranda*"). "Similar," however, does not mean the same. As the Florida Supreme Court recently recognized in *Rigterink*:

> [S]ection 9 [of Article I of the Florida Constitution] does *not* contain a proviso that we must follow federal precedent with regard to the right against self-incrimination. . . . Thus, in this context, the federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by

> the Florida Constitution more broadly than that afforded by its federal counterpart.

2 So. 3d at 241 (emphasis in original);[3] *see also Evans v. Arizona*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual

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[3] The Florida Supreme Court has recognized an independent state constitutional requirement that police advise suspects of the right to have a lawyer present during interrogation. It has not done so with respect to certain other self-incrimination issues. *See State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997) (stating that *Traylor* did not establish an independent state constitutional basis "for requiring police to clarify a suspect's equivocal request to terminate questioning," that the *Traylor* defendant "made no request whatsoever that he wished to invoke his *Miranda* rights," and that "our conclusions [in *Traylor*] were no different than those set forth in prior holdings of the United States Supreme Court"); *Sapp v. State*, 690 So. 2d 581, 585-86 (Fla. 1997) (stating that *Traylor* did not establish an independent state constitutional right "to anticipatorily invoke the right to have counsel present during custodial interrogation" by signing a claim of rights form at first appearance but subsequently waiving those rights in writing immediately before interrogation, and that "we do not interpret article I, section 9 of the Florida Constitution as [affording greater protection than the federal Constitution] here"); *Ramirez v. State*, 739 So. 2d 568, 573 & n.3 (Fla. 1999) (finding that custodial statements elicited without *Miranda* warnings and statements made after an oral waiver after police administered *Miranda* warnings but downplayed their significance must be suppressed and acknowledging that "[t]he protections enunciated in *Miranda* have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution," but noting in dicta that "'our conclusions [in *Traylor*] were no different than those set forth in prior holdings of the United States Supreme Court'" (quoting *Owen*, 696 So. 2d at 719)).

rights than do similar provisions of the United States Constitution.").

With that in mind, if this Court were to reverse the decision below it would not change the outcome in Florida. As such, the holding in this case is not dependent on federal law. Any decision by this Court, therefore, would be an impermissible advisory opinion because "the same judgment would be rendered by the state court after [it] corrected its views of federal law." *Long*, 463 U.S. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)); *accord Coleman*, 501 U.S. at 729 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Long*, 463 U.S. at 1040. For this reason, the Court should dismiss the writ as improvidently granted.

B. This Case Is Unlike Those in Which the Court Has Exercised Jurisdiction

When this Court dismisses on the basis of independent and adequate state grounds, it often does not issue an opinion, so there are few decisions available reflecting that circumstances like those

here warrant dismissal. What can be demonstrated, however, is that this case is unlike those in which the Court has rejected challenges to its jurisdiction. In *Long*, for instance, "[t]he court below referred twice to the state constitution . . . but otherwise relied exclusively on federal law," 463 U.S. at 1037, whereas the Florida Supreme Court cited the Florida Constitution no less than five times as the basis for its decision.[4]

Similarly, this case is unlike *Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) (plurality opinion), in which the Court exercised jurisdiction where the Florida Supreme Court had "mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution." There, the court below could not have relied on independent state grounds because of a

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[4] *See also Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (exercising jurisdiction where decision below "does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally [and] the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments"); *Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (state court mentioned state constitution in passing and cited only federal cases); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986) (exercising jurisdiction where "the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution").

1982 state constitutional amendment requiring courts to construe Article I, Section 12 of the Florida Constitution "'*in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court*'" and to "provide no greater protection than those interpretations." *Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988) (quoting and adding emphasis to Fla. Const. art. I, § 12).

This case is also unlike *Evans*, where this Court rejected an argument that the decision below rested on independent and adequate state grounds, in particular a state "good-faith statute." 514 U.S. at 6-7, 9. The decision below in *Evans* reflected that the good-faith statute was of no import because the case was "not about the motives of the police" and "[t]he fact that the arresting officer acted in good faith [was] irrelevant." *State v. Evans*, 866 P.2d 869, 871 (Ariz. 1994).

And this case is unlike *Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996), and *New York v. Class*, 475 U.S. 106, 109-10 (1986), because, there, the state high courts did not make clear that the applicable state constitutional protections were independent of federal requirements.[5] By contrast, the Florida

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[5] This case is also unlike *Kansas v. Marsh*, where the decision below was based on a prior state court decision that, "itself, rested on federal law." 548 U.S. 163, 169 (2006); *see also Michigan v. Chesternut*, 486 U.S. 567, 571 (1988) ("Like the court below it, the [state high court] rested its ruling on state precedents interpreting the Fourth Amendment.").

Supreme Court in this case explicitly based its holding on the independent state constitutional proscription against compelled self-incrimination set forth in *Traylor*. While the Florida Supreme Court's plain statement of the Florida constitutional ground here far exceeds the indicia in *Labron* and *Class*, on remand the courts in those cases confirmed that their original decisions were, indeed, premised on state law grounds and did not disturb the outcome of the original decisions for the defendants. *Commonwealth v. Labron*, 690 A.2d 228, 228 (Pa. 1997) (reaffirming original decision and "explicitly not[ing] that it was, in fact, decided upon independent state grounds, i.e., Article I, Section 8 of the Pennsylvania Constitution"); *People v. Class*, 494 N.E.2d 444, 445 (N.Y. 1986) (reaffirming original decision and stating that the court had "initially and expressly relied on the State Constitution").

Even if this Court were to reach the merits and reverse, the Florida Supreme Court on remand could not ignore its holding that the warnings given Powell were insufficient under the Florida Constitution and *Traylor*. In all events, the outcome of this case will be reversal of Powell's conviction, whether under state or federal law (or both). To avoid rendering an impermissible advisory opinion, this Court should dismiss the writ of certiorari as improvidently granted.

II. THE FLORIDA SUPREME COURT'S DECISION IS FULLY CONSISTENT WITH *MIRANDA* AND DECISIONS INTERPRETING *MIRANDA*

In the event that the Court reaches the merits of the case, it should affirm the decision below. The decision is in line with the plain requirements of *Miranda*, with federal court of appeals decisions interpreting comparable warnings, and with the practices of law enforcement agencies across the country.

A. *Miranda* Requires that Police Clearly Inform Suspects of their Right to Have Counsel Present Before and During Custodial Interrogation

One of the core requirements of *Miranda*, as Petitioner and the Solicitor General acknowledge, is that police must inform suspects of their right to have counsel present during a custodial interrogation. *See, e.g.*, Br. 11-12; SG Br. 7-8, 12. In this regard, *Miranda* could not have been more explicit: "an individual held for interrogation must be clearly informed that he has the *right to consult with a lawyer and to have the lawyer with him during interrogation*. . . ." 384 U.S. at 471 (emphasis added). Indeed, "this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Id.* at 471-72.

The basis for requiring law enforcement officers to convey the right of suspects to counsel during questioning is that counsel's presence can counter the inherent pressures of the interrogation atmosphere. *Id.* at 468. At the time this Court decided *Miranda*, as today,[6] "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Id.* at 461; *accord Dickerson v. United States*, 530 U.S. 428, 435 (2000). The presence of a lawyer is "indispensable to the protection of the Fifth Amendment privilege" because, as this Court explained, "[w]ith a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court." *Miranda*, 384 U.S. at 469-70. Further, "the presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Id.* at 470. Thus, this Court held "the need for counsel to protect the Fifth Amendment privilege comprehends

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[6] *See generally* Richard A. Leo, *Police Interrogation and American Justice* (Harvard Univ. Press 2008) (providing comprehensive study of police interrogation in America); Charles D. Weisselberg, *Mourning* Miranda, 96 Cal. L. Rev. 1519, 1538 (2008) ("[T]he *Miranda* Court concluded that custodial interrogations contain inherently compelling pressures. . . . The best evidence today supports the same legal conclusion reached by the *Miranda* Court.").

not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.*

In the four decades since *Miranda*, this Court has reiterated that police must convey to suspects the right to have counsel present during questioning. *See, e.g.*, *Fare*, 442 U.S. at 717 ("The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation.").[7] Just last Term, this Court again recognized that a defendant's "*Miranda* rights . . .

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[7] *See, e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) ("*Miranda* warnings, we said, effectively convey to a defendant his right to have counsel present during questioning."); *Davis v. United States*, 512 U.S. 452, 457 (1994) ("[W]e held in *Miranda v. Arizona* [], that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins."); *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) (*Miranda* requires "that the suspect be informed, as here, that he has the right to an attorney before and during questioning"); *California v. Prysock*, 453 U.S. 355, 361 (1981) (per curiam) ("It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost. . . ."); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) ("*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.").

include the right to have counsel present during interrogation. . . ." *Montejo*, 129 S. Ct. at 2085.

Because it is undisputed that *Miranda* requires police to inform suspects of the right to counsel during interrogation, the narrow issue presented in this case is whether the warning form drafted by the Tampa Police Department and later read verbatim to Powell clearly conveyed this right. It did not.

B. The Decision Below Is Consistent With Decisions of the Federal Courts of Appeals, Which Uniformly Have Found "Before Interrogation" Warnings Misleading

The Florida Supreme Court held that the warning read to Powell was "misleading":

> In this case the warning was misleading. The warning said "*before* answering any questions." The "before questioning" warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning; there is nothing in that statement that suggests the attorney can be present during the actual questioning.

JA 171. That holding is in accord with every federal court of appeals decision that has assessed the validity of similar warnings on direct review.

1. The Federal Courts of Appeals Uniformly Have Rejected Warnings Like Those Here

Although law enforcement officers need not administer "a virtual incantation of the precise language contained in the *Miranda* opinion," *Prysock*, 453 U.S. at 355, the language used by law enforcement must provide a "fully effective equivalent" of the warnings set forth in *Miranda*. *Id.* at 360; *accord* Br. 17; SG Br. 10; *United States v. Tillman*, 963 F.2d 137, 141 (6th Cir. 1992) ("Although there is no mandate that 'magic words' be used, there is a requirement that all elements of *Miranda* be conveyed."). In short, what matters is the substance of the warnings, not the form.

The federal courts of appeals have differed on what constitutes a "fully effective equivalent" warning that conveys the right to counsel during interrogation. All, however, agree that warnings suggesting a "restriction," "false limitation," or "qualification" on a suspect's access to counsel – like the warnings here – violate *Miranda*.

There are two lines of cases in this regard -- both consistent with the Florida Supreme Court's decision below. On the one hand, the Second, Fourth, Seventh, and Eighth Circuits have held that "general" warnings – such as "you have the right to an attorney" or the "right to have a lawyer present" – can satisfy *Miranda*. *See, e.g.*, *United States v. Lamia*, 429 F.2d 373, 376-77 (2d Cir. 1970); *United States v.*

Frankson, 83 F.3d 79, 82 (4th Cir. 1996); *United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973); *United States v. Caldwell*, 954 F.2d 496, 502-04 (8th Cir. 1992). This is because a warning with no temporal limitation or qualification can be interpreted to include the right to have an attorney present both before and during interrogation. *See, e.g., Frankson*, 83 F.3d at 82.

On the other hand, the Fifth, Sixth, Ninth, and Tenth Circuits have held that such general warnings are insufficient, and police must explicitly advise of the right to counsel during interrogation. *See, e.g., Windsor v. United States*, 389 F.2d 530, 533-34 (5th Cir. 1968); *United States v. Tillman*, 963 F.2d 137, 140-42 (6th Cir. 1992); *United States v. Noti*, 731 F.2d 610, 615-16 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669, 672-74 (10th Cir. 1981).

Although these courts differ on the specificity of the warnings required, they agree on one thing: warnings that misleadingly suggest that an attorney may be consulted only before interrogation do not comport with *Miranda*.

The courts that have upheld "general" warnings indicate that warnings suggesting a limitation on access to counsel are deficient under *Miranda*. In *Lamia*, for instance, the Second Circuit found that a general warning advising of the "right to an attorney" satisfied *Miranda* because the suspect was "told nothing that would suggest any restriction on the attorney's functioning." 429 F.2d at 377. The court

highlighted that this general warning was sufficient because it was unlike the warning held invalid in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), which advised only of a right to "consult an attorney prior to any question." *Lamia*, 429 F.2d at 377; *see also Fox*, 403 F.2d at 100.[8]

Similarly, the Eighth Circuit, citing *Fox*, found that "the general warning that Caldwell had the right to an attorney . . . could not have misled Caldwell into believing that an attorney could not be present during questioning." *Caldwell*, 954 F.2d at 504. Rather, "[i]f there was a deficiency in the warning, it

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[8] *Lamia* retreated from aspects of *Fox*, but not *Fox*'s holding that the warning's qualification of the right to counsel only "prior to any question" was misleading:

> [T]he majority in that case, including a member of this panel, considered the warning that Fox "could consult an attorney prior to any question" to be affirmatively misleading since it was thought to imply that the attorney could not be present during the questioning. Whether this was correct or not, we think that *Fox* must be considered to rest on [this and another basis] and that other observations in the opinion represented too formalistic an approach to *Miranda*. Here Lamia was apprised that an attorney would be appointed if he was unable to afford one, and was told nothing that would suggest any restriction on the attorney's functioning. We find that the substance of the required warnings was given.

Lamia, 429 F.2d at 377; *see also United States v. Dizdar*, 581 F.2d 1031, 1038 (2d Cir. 1978) (upholding a warning providing that the defendant was "entitled to have a lawyer present" in part because it was unlike the warning in *Fox*).

is in the ambiguity of the warning, not that the warning actively misled Caldwell by suggesting a false limitation of his right to counsel." *Id.* at 502. Likewise, the Seventh Circuit found that a form used by IRS investigators advising that "you may, if you wish, seek the assistance of an attorney before responding" violated *Miranda* in part because the defendant "was not told that he could have counsel present during the questioning." *United States v. Oliver*, 505 F.2d 301, 303, 306 & nn.5-6 (7th Cir. 1974), *abrogated on other grounds by United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976) (finding interviews like the one in *Oliver* non-custodial).

These cases are consistent with *Prysock*, where this Court upheld a warning that provided, "[y]ou have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning" in part because "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel. . . ." 453 U.S. at 356, 360-61. This Court explained that "[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning." *Id.* at 361 (quoting *United States v. Noa*, 443 F.2d 144, 146 (9th Cir. 1971)).

The courts of appeals requiring a more explicit warning of the right to have counsel present *during* questioning also have rejected warnings like the ones read to Powell, not because they affirmatively mislead, but because they omit a material element of

Miranda. The Fifth and Ninth Circuits, for instance, have long held that a warning advising only of the right to counsel "before" interrogation is incomplete:

> It is obvious that the full *Miranda* warnings were not given to appellant at any time prior to obtaining either the oral or written confession because Windsor was not informed by the Government agents that he was entitled to the presence of an attorney, retained or appointed, during the interrogations. . . . Merely telling him that he could speak with an attorney or anyone else before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation and that one will be appointed if he cannot afford one.

Windsor, 389 F.2d at 533; *accord Noti*, 731 F.2d at 614-15 (citing *Windsor* and holding that a warning providing "the right to the services of an attorney before questioning" was invalid under *Miranda*); *United States v. Bland*, 908 F.2d 471, 473-74 (9th Cir. 1990) (holding that a warning providing the "right to an attorney prior to questioning" was invalid under *Miranda*).

The reasoning in the decisions requiring a more explicit warning of the right to counsel *during* interrogation is in accord with a statement accompanying the denial of certiorari in *Bridgers v. Texas*, 532 U.S. 1034, 1034 (2001) (statement of Breyer, J., with whom Stevens, J. and Souter, J. joined,

respecting the denial of the petition for writ of certiorari). There, Members of the Court stated that the warnings given the defendant providing only the "right to the presence of an attorney/lawyer prior to any questioning" said "nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element." *Id.*

The Florida Supreme Court's decision is fully consistent with the reasoning in all of the decisions above. In accord with the reasoning in *Fox*, *Caldwell*, *Oliver*, and *Prysock*, the Florida Supreme Court found that the warnings read to Powell placed an affirmatively "misleading" qualification on his access to counsel. JA 171. And as in *Windsor*, *Noti*, *Bland*, and the statement accompanying the denial of certiorari in *Bridgers*, the Florida Supreme Court found that, if not affirmatively misleading, the warning misled by omission because there was "nothing in that statement that suggests the attorney can be present during the actual questioning." JA 171.

In sum, the "split" upon which Petitioner sought review in this Court, *see* Petition at 9-10, and presently attempts to cabin this case, *e.g.*, Br. 21 n.5, has no application here. Federal courts of appeals considering warnings like the ones given Powell uniformly have held them defective.

2. Petitioner and the Solicitor General Ignore the Relevant Decisions

Rather than address the holdings and reasoning of the relevant decisions, Petitioner and the Solicitor General simply ignore them. Instead, they cite a handful of cases that they erroneously assert conflict with the decision below.

Petitioner, for instance, relies on *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005), another case stemming from a Florida warning form. Br. 21-22 n.6. That case, however, does not depart from the uniform holdings of the federal courts of appeals.[9] In *Bridgers*, Florida law enforcement officers, reading from a card issued by the Fort Lauderdale Police Department, advised the defendant that "[y]ou have the right to the presence of an attorney/lawyer prior to any questioning." 431 F.3d at 856. Applying the highly deferential standard of review for habeas petitions,

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[9] Petitioner also suggests that *United States v. Vanterpool*, 394 F.2d 697 (2d Cir. 1968), and *United States v. Anderson*, 394 F.2d 743 (2d Cir. 1968), held that warnings like the ones at issue here satisfy *Miranda*. Br. 20 n.4. The warnings in those decisions, however, apprised the defendant of a right to counsel "at this time," meaning at the time of the interrogations that were then taking place. The Second Circuit later made clear that warnings advising of only the right to counsel before interrogation differed from the warnings at issue in *Vanterpool* and *Anderson*. *See Fox*, 403 F.2d at 100 n.1 (noting that "the warnings upheld in [*Vanterpool* and *Anderson*] went much further toward complying with the substance of *Miranda* than those given Fox," who was told merely that "he could consult an attorney prior to any question").

the Fifth Circuit concluded that the decision of the Texas Court of Criminal Appeals upholding the warning was not "objectively unreasonable." *Id.* at 860. The court indicated, however, that the outcome would have been different on direct review. *See id.* at 860 n.6 (highlighting habeas context and noting that a prior decision holding that "a suspect must be explicitly warned that he has the right to counsel during interrogation . . . remains binding precedent for cases on direct appeal in this Circuit").

Beyond its limited application to the habeas context, *Bridgers* involved a warning that the Texas court found materially different from the form read to Powell. The Texas court determined that the warning sufficiently conveyed the right to counsel during interrogation primarily on the basis that the suspect was told he had a right to the "presence" of counsel before questioning. *Id.* at 857-58. The Texas court distinguished that from warnings, similar to the ones given Powell, that advise only of the right to "consult or speak to an attorney before questioning, which might have created the impression that the attorney could not be present during interrogation." *Id.*; *accord id.* at 860 n.5.

Finally, as noted above, in considering a petition for certiorari on direct appeal in *Bridgers*, Members of this Court stated that the warnings "apparently leave out an essential *Miranda* element." *Bridgers*, 532 U.S. at 1034. The *Bridgers* case thus supports, rather than contradicts, the decision below.

The *only* other case identified by Petitioner as purportedly upholding warnings comparable to the ones given Powell is *State v. Arnold*, 496 P.2d 919, 922-23 (Or. Ct. App. 1972). Br. 20 n.4. The court there reasoned that a "prior to any questioning" warning was adequate on the assumption that – because the defendant had not asked for a lawyer before the interrogation – he would not have asked for one during questioning.[10] That, of course, improperly presupposes that suspects who initially waive their right to counsel before questioning never change their minds after the interrogation begins. Experience demonstrates otherwise.[11]

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[10] *See Arnold*, 496 P.2d at 923 ("Here, defendant was advised of his right to have an attorney present before he answered any questions. He did not request an attorney on that advice. It is reasonable to assume, on these facts, that he would not have requested the presence of any attorney while he answered the police officer's questions, had he been so advised. The advice was adequate."). While not expressly rejecting *Arnold*, the Oregon Court of Appeals has since endorsed an approach like the one taken in the federal cases, which distinguishes general warnings from those that suggest a "qualification" on access to counsel. *See State v. Quinn*, 831 P.2d 48, 52-53 (Or. Ct. App. 1992) (where a defendant was told "you have the right to an attorney," the court held that the warning was sufficient to inform the defendant "that his right to an attorney was unconditional").

[11] Police in fact often structure interviews to "soften up" suspects to encourage them to sign *Miranda* waiver forms. After the form is signed, they become more accusatorial, which may prompt requests for counsel during the interrogation. *See* Leo, *supra*, at 132 ("Once the interrogator has obtained the suspect's implicit or explicit waiver (typically memorialized by his initials

(Continued on following page)

For its part, the Solicitor General's brief, while completely ignoring the federal court of appeals decisions, relies on California state court opinions it claims conflict with the decision below. SG Br. 25-27.[12] As in *Bridgers*, however, the warnings at issue in the California decisions advised of the right to have a lawyer physically "present" rather than the right just to "talk to" an attorney.

In any event, at best, these Oregon and California decisions are the exceptions that prove the rule.

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at the bottom of a *Miranda* advisement form), the tone, content, and force of the interrogation may change dramatically. It is typically after the *Miranda* moment that the interrogation process becomes accusatorial. . . ."). Though police use various tactics to avoid such mid-interrogation requests, they happen. *See id.* at 278-83; *accord, e.g.*, *United States v. Smith*, No. CR09-5088, 2009 WL 1121091, at *3 (W.D. Wash. Apr. 27, 2009) (holding that defendant who initially signed waiver form later properly invoked the right to counsel during interrogation).

[12] *People v. Wash*, 861 P.2d 1107, 1118-19 (Cal. 1993); *see also People v. Lujan*, 112 Cal. Rptr. 2d 769, 778-79 (Cal. Ct. App. 2001); *People v. Valdivia*, 226 Cal. Rptr. 144, 146-47 (Cal. Ct. App. 1986). Although not cited by Petitioner or the Solicitor General, courts in at least one other state appear in accord with *Wash*. *See People v. Gilleylem*, 191 N.W.2d 96, 97 (Mich. Ct. App. 1971) (concluding that a warning providing "[y]ou may have this attorney present here before answering any questions" was sufficient under *Miranda*).

C. The Decision Below Properly Assessed the Substance of the Warnings Given Powell and Did Not Require "Magic Words"

Petitioner and the Solicitor General spend most of their briefs tearing down straw man arguments.

They first suggest that the decision below applied the wrong legal framework by purportedly looking for "magic words" rather than focusing on whether the warnings given Powell "adequately conveyed" the substance of Powell's right to counsel during interrogation. *E.g.*, Br. 21 (arguing that the decision below "misapplied the Court's 'reasonably convey' and 'fully equivalent' standards"); SG Br. 18 ("A reviewing court should focus on the basic substance of the advice and should not demand the use of specific words."). That is wrong.

The Florida Supreme Court was explicit that no particular language is mandated. The court found that, when read as a whole, the rights conveyed to Powell were not the "functional equivalent" of the right to have a lawyer present during questioning. JA 170-71. After specially acknowledging that "there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, *as long as the warnings are not misleading*," the Florida Supreme Court concluded, "[i]n this case the warning was misleading." JA 171 (quotation source omitted) (emphasis in original). The touchstone, the court reasoned, is not particular words, but clarity:

> [T]o advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by *Miranda*. Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning.

JA 174. So although Petitioner and the Solicitor General characterize the issue here as whether *Miranda* requires "a single script," "a single standard form," and "mandat[es] that particular words be used," Br. 12; SG Br. 6, 15, what is really at stake is whether a suspect would be misled by the substantive content of warnings that suggest a limit on access to counsel to before questioning has begun.[13] As shown, federal courts of appeals repeatedly and consistently have answered that question in the affirmative.

Next, building on their flawed foundation that the decision below applied the wrong legal framework, Petitioner and the Solicitor General assert that the

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[13] Thus, contrary to Petitioner and the Solicitor General's suggestion, the decision below would not require suppression of confessions if officers in the field give a warning that "deviates" from the precise language of the *Miranda* decision, so long as the warnins given convey the required substance. Br. 15; SG Br. 13-14, 20. In any event, that is not the situation here. As Petitioner and the Solicitor General acknowledge, the officers here accurately read a printed form developed and used as a matter of policy by the Tampa Police Department. Br. 21 n.5, 24; SG Br. 14 n.5.

Florida Supreme Court's holding is improperly formalistic because, they say, it requires that police explicitly use the word "during" in any warning. *E.g.*, Br. 10 (arguing that the decision below improperly expanded *Miranda* "by requiring law enforcement to expressly advise suspects they have the right to have counsel present during custodial interrogation"); *accord id.* 9, 22; SG Br. 27 ("The decision below appears to presuppose that *Miranda* warnings must include language specifically advising the suspect of the 'presence-during-questioning' aspect of the right to counsel."). That too is incorrect.

As lower courts interpreting the *Powell* decision have recognized, the Florida Supreme Court did not require police explicitly to advise suspects of the right to counsel *during* interrogation. Several decisions from the Florida Second District Court of Appeal have held that generalized warnings such as "[y]ou have the right to the presence of an attorney" sufficiently convey the right to counsel before and during interrogation because – unlike the warnings given Powell – they do not suggest any limitation. *E.g.*, *State v. Smith*, 6 So. 3d 652, 653 (Fla. 2d Dist. Ct. App. 2009) ("In this case, however, Smith was told: 'You have the right to the presence of an attorney.' Nothing Smith was told suggested that his right to the presence of an attorney was limited to the period 'before questioning.' Therefore, this case is distinguishable from *Powell*. . . ."), *review denied*, 2009 WL 2989781 (Fla. Sept. 17, 2009); *State v. Fletcher*, 16 So. 3d 1040, 1040 (Fla. 2d Dist. Ct. App. 2009) ("Mr.

Fletcher and Mr. Lee signed 'Warnings to Suspects' cards which state, 'You have the right to the presence of an attorney.' This unrestricted warning is distinguished from the one given in *Powell* and identical to language recently approved by this court in *State v. Smith*. . . . Accordingly, we reverse the trial court's [suppression] order."). The decision below itself discussed without disagreement *Graham v. State*, 974 So. 2d 440, 440 (Fla. 2d Dist. Ct. App. 2007), which likewise upheld generalized warnings. JA 165.

Indeed, although in this case Petitioner argues that *Powell* stands for the proposition that the word "during" must be included in *Miranda* warnings, *e.g.*, Br. 10, in previous cases in Florida, Petitioner repeatedly has argued that generalized warnings containing no mention of "during" create no conflict with the holding in *Powell*. *See, e.g.*, Jurisdictional Brief of State of Florida at *4-6, *Smith v. State*, No. SC09-739 (Fla. May 18, 2009), 2009 WL 1635223 (arguing that the warning that a suspect has the "right to the presence of an attorney" does not conflict with *Powell* even though the suspect was not explicitly advised of his right to an attorney during interrogation).

D. The Decision Below Is Consistent With Law Enforcement Practice Across the Country

In the practical day-to-day application of *Miranda*, law enforcement agencies in nearly every jurisdiction in the country have determined that

warnings advising only of the right to counsel "before" interrogation are inconsistent with *Miranda*. Social scientists studying *Miranda* have collected warning forms used by federal, state, and local law enforcement agencies in over 600 jurisdictions (representing 49 states, the District of Columbia, the Virgin Islands, Puerto Rico, as well as forms used by two federal law enforcement agencies and the U.S. Army Criminal Investigation Command). *See* Rogers et al., *supra*, at 124-26; Rogers & Shuman, *supra*, at 1-24; Weisselberg, *supra*, at 1565 & nn.258-260 (discussing the Rogers et al. studies).

Using hundreds of different verbal formulations, nearly all of these warning forms advise of either the right to counsel during questioning or before and during questioning. *See* Rogers & Shuman, *supra*, at 42-63; *see also* SG Br. 13 n.4.

And, as the Solicitor General confirms, "all the forms used by the various federal law enforcement agencies explicitly advise the suspect of the full contours of each right, including the right to the presence of counsel during questioning." SG Br. 12 & n.3 (quoting warning forms used by the Federal Bureau of Investigation, Internal Revenue Service, and other federal law enforcement agencies). These federal warnings, too, while similar in substance, employ "minor variations" in wording. SG Br. 8 & nn.2-3.

Of the over 900 forms in the studies discussed above and the federal forms cited by the Solicitor General, only *five* advise of a right to talk to a lawyer or to have the lawyer present "before questioning" without also articulating the right to counsel *during* interrogation. Rogers & Shuman, *supra*, at 42, 43, 48, 52; SG Br. 12 n.3. Of those five, only one warning form, like the form read to Powell, neglects even to mention the right to have a lawyer "present." Rogers & Shuman, *supra*, at 48. As explained above, moreover, the warning given Powell is an outlier even within Florida, where it appears that most law enforcement agencies use *Miranda* warnings that advise suspects of the right to have an attorney present during questioning. *See supra*, at pp. 7-8.

The fact that these law enforcement agencies have administered the core *Miranda* warning of the right to have counsel present during interrogation in hundreds of different ways demonstrates that no "magic words" are required. Some jurisdictions inform suspects of the right to counsel "before and during" interrogation, while others advise of the right to counsel "while you are being questioned"; "before and during any questioning"; "prior to and during any questioning"; "while . . . making a statement"; "during the interview"; "during the entire time you are being questioned"; "at the time of the interview"; "before and while answering any questions"; "prior to and during any interview"; "before, during, and after questioning"; or "while we talk to you." Rogers &

Shuman, *supra*, at 42-63. Most warnings expressly advise of the right to have counsel "present" or "present with you," although many inform of the right to have a lawyer "with you." *Id.*

E. Petitioner and the Solicitor General's Defense of the Warnings Here Is Without Merit

Petitioner dedicates very little attention to defending the actual content of the warning given Powell. When it does, it appears to make two main arguments: (1) the warning stating that Powell had a right to talk to a lawyer before questioning implied the right to have counsel present during questioning but, if not, (2) the warning's last sentence – "[y]ou have the right to use any of these rights at any time you want during this interview" – cured any defect. Both arguments are incorrect and employ the very "strained, literalistic," Br. 23, approach this Court has condemned.

First, Petitioner argues that "common sense" indicates that a person advised of the right to talk to a lawyer before interrogation would presume the right to counsel during the questioning because "it would be incredible to suggest that an attorney would have been squired out the door once questioning began." Br. 25; *see also* SG Br. 24-25. While Petitioner and the Solicitor General consider their view of Form 310 as the "common sense" interpretation, Br. 16-18; SG Br. 24, they ignore that numerous federal and Florida judges have interpreted warnings advising of

the right to counsel "before" or "prior to" interrogation to be misleading. They also ignore the real world reality that warnings are not given in comfortable surroundings where a suspect can parse the words in the manner employed by Petitioner and the Solicitor General. Rather, "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Miranda*, 384 U.S. at 461.[14]

Second, Petitioner and the Solicitor General argue that – because the last sentence of the form read to Powell stated that "[y]ou have a right to use any of these rights at any time you want during this interview" – "[t]hat warning eliminated any inference that counsel could not be present after the interview commenced." SG Br. 26; *accord* Br. 8, 18. This was easily answered by the Florida Supreme Court:

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[14] Like Petitioner, the Solicitor General argues that it is inappropriate to "[f]ocus[] on the precise wording of the warning at the expense of their substance." SG Br. 15. Yet the Solicitor General's brief engages in exactly that sort of formalistic argument. It closely parses the words of the warning and claims that the phrase "before answering any of our questions" clearly conveys that a suspect could request a lawyer before each of the police's questions during the course of the interrogation. SG Br. 23. The Solicitor General's argument depends on the formalistic premise that "before answering any of our questions" does not have the same meaning as "before any questioning" or "before questioning." SG Br. 23, 26. In the rush to analyze the warning word-for-word, the Solicitor General ignores that Petitioner repeatedly characterized that part of the warning as being equivalent to "before questioning." *See, e.g.*, Br. 6, 10, 18.

> This last sentence could not effectively convey a right the defendant was never told he had. In other words, how can a defendant exercise at any time during an interrogation a right he did not know existed? The catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.

JA 172.[15]

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[15] A federal district court in Florida rejected a similar argument. In *United States v. Taylor*, federal agents reading from a standard form then used by the Department of Homeland Security, advised the defendants that "[y]ou have the right to talk to a lawyer for advice before we ask you any questions." No. 05-60072, at 5 (S.D. Fla. July 26, 2005) (magistrate judge's report and recommendation). The magistrate judge found the warning invalid under *Miranda*, concluding that most criminal attorneys, to say nothing of "a suspect unschooled in the law," would construe the form as impermissibly limiting access to counsel to the period before interrogation. *Id.* at 12. Notably, the government in that case, like here, argued that other clauses in the form – a provision providing that "[i]f you decide to answer questions now without a lawyer present, you have the right to stop answering at any time" and a waiver provision providing "[a]t this time, I am willing to answer questions without a lawyer present" – were sufficient to support a "reasonable inference" of the right to have an attorney present during questioning. *Id.* at 6, 11. The magistrate judge rejected the government's parsing of the form, concluding that the "waiver portion of the form incorporates the statement of rights portion, which sets forth the right to counsel *before* questioning only. Moreover, there is no indication in the form that the right to terminate questioning implies a right to request counsel or

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Last, Petitioner ultimately retreats from the warning itself and, like the Oregon Court of Appeals case upon which it relies, Br. 20 n.4, suggests that it does not matter whether the warning here was deficient. It argues that "Powell never unequivocally exercised his right to an attorney; therefore, it begs the question how any failure to specifically inform him that he had a right to an attorney during questioning would have made any difference to Powell's exercise of a known right to an attorney." Br. 23 n.7; *see also id.* 25. Petitioner's demand that Powell should have made an "unequivocal" request for counsel, however, serves only to illustrate the need for a clear warning. When suspects seek to invoke their right to counsel during an interrogation they are required to do so clearly and explicitly:

> [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

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consult with counsel during the interrogation process." *Id.* at 11-12. In adopting the magistrate judge's recommendation, the district court "note[d] that no objections to the Report & Recommendation have been filed by the United States." *Taylor*, No. 05-60072 (S.D. Fla. Aug. 9, 2005) (order adopting report and recommendation); *see also* Paula McMahon & Ihosvani Rodriguez, *Feds Make Miranda Blunder*, S. Fla. Sun-Sentinel, Aug. 6, 2005, at 1B (reporting that the Bureau of Immigration and Customs Enforcement determined that the form used in *Taylor* differed from the approved form used nationwide and that after the form was held invalid "[t]he agency took immediate action to ensure that every field office in the country" was using the proper form), *available at* 2005 WLNR 23613777.

> circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel.

Davis, 512 U.S. at 459. If the suspect's request is not clear and unambiguous, the police have no obligation to stop the questioning. *Id.* at 461-62.[16]

Thus, under Petitioner's approach a suspect would be required to invoke his right to counsel clearly and unequivocally, but law enforcement officers would not have a corresponding obligation to explain those rights clearly and unequivocally. "If the suspect is not made aware of when he can have an attorney, he will not realize that he is entitled to have an attorney present during interrogation, and any request for an attorney may seem ambiguous. The *Davis* threshold creates a double standard. . . ."[17]

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[16] *E.g.*, *Davis*, 512 U.S. at 455 (defendant initially waived his right to counsel, but one hour into questioning stated "maybe I should talk to a lawyer," which was held too ambiguous to require that questioning cease); *United States v. Peters*, 435 F.3d 746, 751-52 (7th Cir. 2006) (citing cases reflecting the types of requests that have not satisfied the "strict" clarity requirement).

[17] Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the* Miranda *Warning "You Have the Right to an Attorney,"* 90 Marq. L. Rev. 1009, 1031 (2007); *accord* Daria K. Boxer, Comment, Miranda *With Precision: Why the Current Circuit Split Should Be Solved in Favor of a Uniform Requirement of an Explicit* Miranda *Warning of the Right to Have Counsel Present During Interrogation*, 37 Sw. U. L. Rev. 425, 447 (2008) ("[C]onsidering a 'lawyer-like clarity' that the

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Beyond that, Petitioner's speculation about what might have transpired if Powell had been adequately warned of his rights or what Powell actually understood is inconsistent with the "bright line" virtues of *Miranda* for police and suspects:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Miranda, 384 U.S. at 468-69 (footnote omitted).

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modern case law demands from suspects to invoke their right to counsel, it appears fair to require the same level of precision from the trained law enforcement personnel." (footnotes omitted)).

F. Affirming the Decision Below Will Not Burden Law Enforcement

Finally, affirming the decision below will not "unduly burden" law enforcement. Br. 12; *see also id.* 22, 27. As noted, all federal law enforcement agencies and virtually all state and local agencies appear already to use printed forms that satisfy the standards set forth in the decision below. And Petitioner notes that the Tampa Police Department has since modified its form. Br. 21 n.5. Thus, affirming the decision below will do little more than confirm the status quo.

But if the Court finds the warning here sufficient under *Miranda*, the overwhelming majority of jurisdictions now using forms that comply with the current state of *Miranda* law would be tempted to narrow their warnings to advise only of the right to talk to counsel before interrogation or otherwise modify their forms. As the Solicitor General acknowledges, such changes would "increase . . . the litigation costs of defending any statement." SG Br. 17 n.7. To be sure, the Solicitor General states that "law enforcement agencies generally have little incentive to replace the conventional warnings with some other phrasing." *Id.* But that confidence is not shared by those who have studied modern police practices. *See, e.g.*, Leo, *supra*, at 124 ("Perhaps the most fundamental police strategy to successfully negotiate *Miranda* is to do an end run around its requirements by taking advantage of the definitions, exceptions, and ambiguities in *Miranda* doctrine."); *see also* Brief

for the United States at *37-38, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 141075 (Jan. 28, 2000) ("Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, *others might significantly modify them. . . .*" (emphasis added)).[18] Thus, while advocating that state and local jurisdictions "model their *Miranda* warnings on the federal formulation," SG Br. 6; *accord id.* 9, 13, adopting the Solicitor General's view would have the opposite effect.

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[18] Upholding the warnings used here also could impede the ability of courts to determine whether defendants have clearly waived their Sixth Amendment rights. This Court has held that advising a defendant of the right "to have counsel present during the questioning" provides sufficient information to secure a "knowing and intelligent" waiver of the right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 293 (1988). Last Term, this Court recognized that when "a defendant is read his *Miranda* rights (*which include the right to have counsel present during interrogation*) and agrees to waive those rights, that typically does the trick [to waive the Sixth Amendment right to counsel], even though the *Miranda* rights purportedly have their source in the Fifth Amendment." *Montejo*, 129 S. Ct. at 2085 (emphasis added). Thus, a clear *Miranda* warning provides a bright-line means for courts to assess Sixth Amendment waivers. The warning advocated by Petitioner here, however, does not provide the clarity afforded by the warnings underlying the *Montejo* and *Patterson* decisions. If law enforcement agencies adopt watered down warnings, that could spur litigation over the sufficiency of Sixth Amendment waivers.

That police departments and other law enforcement agencies modify forms to try to increase confessions is supported by the circumstances that led to the present case. In 1984, Tampa Form 310 stated clearly, "I further understand that prior to *or during* this interview that I have the right to have an attorney *present*." *Thompson v. State*, 595 So. 2d 16, 17 n.3 (Fla. 1992) (quoting Form 310) (emphasis added). Despite uniform federal court of appeals decisions to the contrary, Tampa changed its form to suggest an inappropriate limitation on the right to counsel. And Tampa continued to use the misleading form read to Powell even after Florida courts had found a comparable form used in another Florida jurisdiction defective.[19] It was only after the *Powell*

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[19] In the months immediately preceding Powell's interrogation, the Fourth District Court of Appeal had held that warnings comparable to the ones at issue here were defective. *See Roberts v. State*, 874 So. 2d 1225, 1228-29 (Fla. 4th Dist. Ct. App. 2004) (holding that a warning providing "[y]ou have the right to talk with a lawyer and have a lawyer present before any questioning" was invalid); *accord West v. State*, 876 So. 2d 614, 615-16 (Fla. 4th Dist. Ct. App. 2004); *Franklin v. State*, 876 So. 2d 607, 608 (Fla. 4th Dist. Ct. App. 2004); *President v. State*, 884 So. 2d 126, 127 (Fla. 4th Dist. Ct. App. 2004) (per curiam). The record does not reflect why the Tampa form was not changed in light of these decisions (or exactly when the form was subsequently changed to conform with *Miranda* and Florida Constitutional requirements). What is apparent is that at the time of Powell's arrest and interrogation Petitioner was seeking review of the *Roberts*, *West*, and *President* decisions in the Florida Supreme Court. Further, in the months after Powell's interrogation, Petitioner sought review of the *Franklin* decision in this Court, which was denied. *See Franklin*, 543 U.S. 1081

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decision that Tampa again aligned its form with existing law. *See* Br. 21 n.5.

* * *

In the end, most law enforcement agencies have not had difficulty following the guideposts courts have provided concerning *Miranda* warning forms. That the Tampa Police Department decided that it was willing to risk using a non-compliant warning is no reason to upset longstanding lower court decisions and settled law enforcement practices used across the country. The Florida Supreme Court correctly held that the form here was at odds with both Article I, Section 9 of the Florida Constitution and *Miranda*.

(Jan. 10, 2005); *see also* Petition for Writ of Certiorari, *State v. Franklin*, 543 U.S. 1081 (2005) (No. 04-568), 2004 WL 2418918 (Oct. 20, 2004).

CONCLUSION

For the foregoing reasons, the Court should dismiss the writ of certiorari as improvidently granted or affirm the judgment of the Florida Supreme Court.

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October 2009

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Supreme Court, U.S.
FILED
NOV 2 3 2009
OFFICE OF THE CLERK

No. 08-1175

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.

KEVIN DEWAYNE POWELL,
Respondent.

On a Writ of Certiorari to the Supreme Court of Florida

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Paul G. Cassell and Brett S. Hayman, *Police Interrogations in the 1990s: An Empirical Study of the Effects of Miranda,* 43 U.C.L.A. L. Rev. 839 (1996) 25

REPLY ARGUMENT

In its opening brief, Florida explained why the pre-interrogation warnings at issue, which advise a suspect of his right "to talk to a lawyer before answering any of our questions" and to use that right "at any time you want during this interview," JA 3, satisfy the requirements of *Miranda*. For the reasons Florida articulated, the decision below rested on an unduly technical and inflexible approach to reviewing the sufficiency of *Miranda* warnings and cannot be squared with the precedents of this Court. The Florida Supreme Court therefore erred in suppressing a fully voluntary confession and vacating Powell's felony conviction — his eleventh — for possessing a loaded handgun.

In response, Powell contends that this Court lacks jurisdiction because the decision below rests on independent grounds under the Florida Constitution. The Florida Supreme Court's decision discusses both state and federal law, however, and fails to include the requisite "plain statement" that federal law was used simply as a guide. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the decision below is presumed to rest on federal grounds thereby establishing jurisdiction in this Court. Indeed, a fair reading of the decision simply confirms the conclusion required by *Long*. Most notably, the question certified for the Florida Supreme Court's consideration, and the issue that court resolved in its decision, was whether the challenged warning complied with this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Throughout its opinion, moreover, the Florida Supreme Court framed its analysis and reasoning in terms of federal constitutional requirements. To the

extent it discussed Florida law, the Florida Supreme Court never suggested that the content of that law differed in any respect from the Fifth Amendment as interpreted in *Miranda* and its progeny. The Florida Supreme Court's opinion is thus the paradigmatic case of a state-court ruling in which federal and state law are interwoven. This Court therefore has jurisdiction.

On the merits, the Florida Supreme Court's erroneous decision is problematic for reasons that extend well beyond the specific warning at issue. Although the court purported to acknowledge and apply this Court's instruction to approach *Miranda* warnings in a non-technical and common-sense manner, its actual analysis — like that urged by Powell in his brief — would render a wide range of permissible warnings subject to challenge. Similarly, the decision below would frustrate the search for truth in criminal proceedings, but would not further the purposes of *Miranda*. It therefore should be reversed.

I. The Decision Below Does Not Rest On Independent and Adequate State Grounds, and This Court Therefore Has Jurisdiction.

A. There is no "plain statement" in the decision below indicating that it rests independently on state law.

Michigan v. *Long* instructs that when, as here, a state court interweaves federal and state law, this Court will presume that the decision rests on federal grounds unless the state court "make[s] clear by a

plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." 463 U.S. at 1041. To insulate such a decision from this Court's review, the state court must "indicat[e] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Id.*

The decision below contains no such "plain statement." "Since *Long*, [this Court has] repeatedly [] followed this 'plain statement' requirement." *Harris v. Reed*, 489 U.S. 255, 261 n. 7 (1989). In a case such as this, where the state court decision primarily relies on federal law, the absence of a plain statement is dispositive. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *New York v. Class*, 475 U.S. 106, 109-110 (1986). This Court therefore has jurisdiction to review this matter.

Powell attempts to satisfy *Long* by pointing to the Florida Supreme Court's conclusion that the challenged warnings violated "[b]oth *Miranda* and article I, section 9 of the Florida Constitution." Resp. Br. 17 (quoting JA 174). But this Court has rejected arguments that state-court decisions with similar language rested on independent and adequate state grounds. *See, e.g., Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) (rejecting independent and adequate state ground argument where the Florida Supreme Court, *inter alia*, "conclud[ed] that the search violated the Fourth Amendment and the State Constitution."); *Long*, 463 U.S. at 1037 n.3 (noting that the decision below concluded: "We hold therefore, that the search was proscribed by the Fourth Amendment to United States Constitution and art 1, §11 of the Michigan Constitution.").

In addition, Powell contends that the structure of the decision below indicates that it rests on state law.[1] But *Michigan v. Long* requires a "plain statement" that "clearly and expressly" indicates the state-law basis for the decision. By requiring such a statement, this Court is relieved from the obligation to evaluate the "structure" of an opinion to determine what law it rests upon. Contrary to Powell's characterization, the Florida Supreme Court did not "include[] sections separately addressing federal case law requirements under *Miranda*, and Florida case law requirements independently imposed by the Florida Constitution." Resp. Br. 16 (citing JA 161-163, 164-169). The sections Powell references separately discussed federal and Florida *cases*, but all of those cases treated federal and Florida law as interchangeable and interwoven. Indeed, the Florida court introduced its discussion of those sections by stating that, with regard to both "state and federal courts," "[t]he principles espoused in the *Miranda* decision formed the basis of how these courts have treated the warnings." JA 155. The structure of the opinion below therefore simply shows that the

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[1] However, the Florida Supreme Court stated time and again that the issue before it was "whether *Miranda* requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation." J.A. 164; J.A. 162, 163, 166 (same). The court stated up front that it "answered . . . in the affirmative" the question whether the warnings to Powell violated *Miranda* because they "fail[ed] to provide express advice of the right to the presence of counsel during questioning." J.A. 151. And after further analysis, it reiterated that the warnings violated *Miranda* because they "did not expressly indicate that [Powell] had the right to have an attorney present during questioning." J.A. 170.

discussion of state law was "interwoven" with federal law. *See Long*, 463 U.S. at 1039 n.4 (recognizing that even though state law issues may be present, the Court may exercise jurisdiction "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter" (alteration in original) (internal citation omitted)).

Powell observes that, the Florida Supreme Court referenced *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), for the proposition that, in Florida, prior to a custodial interrogation a suspect must be expressly informed of his right to counsel during questioning.[2] JA 157-158, 170. But that citation and discussion of *Traylor* does not constitute a "plain statement" that the decision below rests independently on Florida law. Powell's argument that this Court should go outside the four corners of the decision below and undertake an examination of other cases purportedly based on Florida law is precisely the kind of analysis *Michigan v. Long* was designed to avoid. *See Long*, 463 U.S. at 1040-41 (concluding that requiring a "plain statement" in the four corners of the opinion" itself "obviates the need to examine state law in order to decide the nature of the state court decision"). In any event if *Traylor* had the dispositive force that Powell now asserts, the Florida Supreme Court would have

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[2] In *Traylor*, the Florida Supreme Court stated that pursuant to article I, section 9 of the Florida Constitution, prior to custodial interrogation a suspect must be apprised: 1) of his right to remain silent; 2) that anything he says can be used against him in court; 3) that he has the "right to a lawyer's help"; and 4) that a lawyer will be appointed at no cost if he cannot afford one. 596 So. 2d at 966. The "right to a lawyer's help" was defined as meaning that "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *Id.* at 966 n.13.

simply cited *Traylor* and had little need to expound upon federal constitutional strictures. *Traylor*, moreover, does not stand as a broad pronouncement that any ruling by the Florida Supreme Court concerning the privilege against self-incrimination necessarily must rest on Florida law *independent* of the federal Constitution. To the contrary, the Florida Supreme Court has recognized repeatedly that "[a]lthough [the] 'analysis in *Traylor* was grounded in the Florida Constitution, *our conclusions were no different than those set forth in prior holdings of the United States Supreme Court.*'" *Ramirez* v. *State*, 739 So. 2d 568, 573 n.3 (Fla. 1999) (quoting *State* v. *Owen*, 696 So. 2d 715, 719 (Fla. 1997)) (emphasis added); *see also Sapp* v. *State*, 690 So. 2d 581, 585-586 (Fla. 1997) ("Although states may afford greater protection to the individual than the federal Constitution does, ... we do not interpret article I, section 9 of the Florida Constitution as doing so here.").

While it is true that "a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee," *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293 (1982), that is simply not what the Florida Supreme Court did in this case. In its analysis of the adequacy of the challenged warnings, the court never suggested that the Florida and United States constitutions imposed different requirements for custodial interrogations. *See Long*, 463 U.S. at 1043 ("The references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law."). At most, this is a case in which "a state court's

interpretation of state law has been influenced by an accompanying interpretation of federal law." *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (citation omitted). Even if the decision is interpreted in that way, this Court has jurisdiction. *See id.*[3]

Finally, the fact that the decision below lacks any "plain statement" of the kind required by *Michigan v. Long* is particularly telling because the Florida Supreme Court has demonstrated that it knows how to include such a statement. *See, e.g., Burr v. State*, 576 So. 2d 278, 280 (Fla. 1991) ("[In *State v. Perkins*, 349 So. 2d 161 (Fla. 1977), we held] that evidence of crimes for which a defendant has been acquitted is not admissible in a subsequent trial ... *Perkins* rests entirely on Florida law. Art. I, § 9, Fla. Const."); *Haliburton* v. *State*, 514 So. 2d 1088, 1090 (Fla. 1987) ("[W]e hold *as a matter of state law* that the failure to suppress appellant's statements obtained in violation of due process of law was reversible error.") (emphasis added). Moreover, in the decision below, the Florida Supreme Court included a paragraph whose only purpose was to clarify the basis and effect of its decision. *See* JA 174 ("Our decision today is not to be applied retroactively to cases that are already final on the date of this opinion. The decision made today is not new law and is not entitled to retroactive application."). The Court's omission of a *Michigan* v. *Long* statement in that paragraph or at any other point in its decision is therefore dispositive.

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[3] *South Dakota v. Neville*, 459 U.S. 553, 558 n.5 (1983) (observing that it was permissible to review federal issues because the state court had relied on federal precedent in its interpretation of South Dakota law).

B. The decision below rests on the Fifth Amendment as interpreted in *Miranda v. Arizona* and its progeny.

A fair reading of the decision below simply confirms the conclusion that the Florida Supreme Court believed that suppression of Powell's inculpatory statement was dictated by the Fifth Amendment's Self Incrimination Clause. At every critical point in the decision, the Florida Supreme Court framed the analysis and result in terms of federal law:

- The "Certified Question" presented to the Florida Supreme Court asked: "Does the failure to provide express advice of the right to counsel during questioning vitiate *Miranda* warnings which advise both (A) the right to talk to a lawyer before questioning and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" JA 151 (omitting footnote that specifically cited *Miranda v. Arizona*).

- In the "Analysis" portion of the opinion the first sentence provides: "The issue before this Court is whether the failure to provide express advice of the right of counsel during custodial interrogation violates the principles espoused in *Miranda v. Arizona*, 384 U.S. 436 (1966)." JA 155.

- The "Florida Courts" portion of the opinion relied on state law precedents

> that, in turn, relied on federal law. The Florida Supreme Court stated: "Our explanation of the federal and state requirements included the requirement that a suspect be informed to the right to have counsel present during questioning. *See Ramirez*, 739 So. 2d at 573 (quoting *Miranda* that suspects must be informed that they have the right to an attorney present during questioning); *Sapp*, 690 So. 2d at 583-84 (citing *Miranda* for the proposition that an individual has the right to have counsel present during custodial interrogation.)." JA 164.

Accordingly, there is no merit to Powell's contention that article I, section 9, of the Florida Constitution independently compelled the Florida Supreme Court's holding.[4] Instead, a fair reading of the opinion indicates the contrary: federal precedent provided the basis for that decision. The Florida Supreme Court plainly believed its holding was

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[4] Powell's arguments add nothing to the identical contentions he unsuccessfully advanced at the certiorari state. Br. in Opp. 6-13. In particular, in opposing certiorari Powell's brief cited and discussed the Florida Supreme Court's decision in *Rigterink* v. *State*, 2 So. 3d 221 (Fla. 2009). Contrary to Powell's contention, *Rigterink confirms* the federal basis for the decisions below. *Rigterink* stated that, in *Powell*, "[t]he right-to-counsel warning was materially deficient because it did not accurately and clearly convey one of the central components of *Miranda*: The custodial subject enjoys a right to the presence of counsel during, not merely before, a custodial interrogation. *See Prysock*, 453 U.S. at 361; *Miranda*, 384 U.S. at 444, 466." *See id.* at 241 ("[The Florida Supreme Court] has generally followed federal Fifth Amendment precedent in interpreting article I, section 9 of the Florida Constitution.").

dictated by *Miranda v. Arizona*. At most, the "[Florida Supreme Court] felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner that it did." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). This Court therefore has jurisdiction.

C. This Court's decision would not be advisory.

Powell predicts that if this Court reverses the judgment of the Florida Supreme Court and remands for further proceedings, the Florida Supreme Court might hold that its decision was based only on article I, section 9 of the Florida Constitution. Accordingly, Powell argues this Court should refrain from deciding this case. That argument is incorrect.

As explained above, when ambiguity exists as to whether a state court's opinion rested on the state or federal constitution, this Court has jurisdiction. *Long*, 463 U.S. at 1042. This Court has exercised jurisdiction in cases analogous to the circumstances presented here. For example, in *Arizona v. Evans*, 514 U.S. 1 (1995), this Court considered whether the exclusionary rule required the suppression of evidence where a suspect was arrested based on erroneous information contained in a computer report. The Arizona Supreme Court held that the evidence should have been suppressed, but did not clearly indicate whether its holding was based on its understanding of the Arizona Constitution or on the Fourth Amendment's exclusionary rule.

This Court rejected arguments that it lacked jurisdiction because an adequate and independent state-law basis existed to affirm. The Court in *Evans* acknowledged that state courts were permitted "to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Id.* at 8. But the Court emphasized that when a state court endeavors to interpret the United States Constitution, it may not evade review by the United States Supreme Court. *Id.* at 8-9. The jurisdictional arguments raised in *Evans* are akin to those asserted in this case. In both situations, however, it is evident that this Court has jurisdiction.

In addition, no concrete basis exists to believe that upon remand, the Florida Supreme Court would simply reinstitute its prior holding, this time solely under state law principles. While it is conceivable that such a result could occur, it is no less conceivable that the opposite might occur if this Court holds that the warnings comport with *Miranda*. Even if the Florida Supreme Court did affirm on remand, it would have to do so purely and explicitly on state-law grounds, a step it did not take in the decision below. *See Evans*, 514 U.S. at 8 (acknowledging that, following its reversal as to the Arizona Supreme Court's interpretation of the Fourth Amendment's exclusionary rule, upon remand the state court would be free to address still-extant state law issues "because [the Arizona Supreme Court was now] disabused of its erroneous view of what the United States Constitution requires."). Accordingly, this Court would not be rendering an advisory opinion in this matter.

II. The *Miranda* Warnings Issued to Powell Reasonably Conveyed His Rights Under Federal Law.

A. The Florida Supreme Court did not heed this Court's instruction that warnings must only "reasonably convey" the *Miranda* warnings.

Powell attempts to portray the decision below as consistent with the standards this Court has prescribed for review of *Miranda* warnings, contending that the Florida Supreme Court acknowledged the proper legal framework. That characterization, however, is inaccurate. Although the Florida Supreme Court incorporated certain language from precedent from this Court, it nevertheless held that, on pain of suppression, compliance with the dictates of *Miranda v. Arizona*, 384 U.S. 436 (1968), requires that an individual subject to a custodial interrogation must be explicitly told that he is entitled to the presence of counsel during the interrogation. That holding is inconsistent with decisions of this Court, and the basic approach the Florida Supreme Court applied would encourage unnecessary litigation about the validity of other adequate warnings.

This Court has repeatedly noted that latitude is appropriate in the form of the *Miranda* warnings, and that such warnings are adequate as long as they "reasonably convey" the suspect's rights. *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 611 (2004); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). In *California v. Prysock*, 453 U.S. 355 (1981), this Court made clear that the protections afforded by the *Miranda* warnings were not dependent on the manner

in which they were recited. *Prysock* recognized that reducing the *Miranda* warnings to a simple rote verbal formulation was inappropriate: "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *Id.* at 359. Similarly, *Duckworth v. Eagan*, 492 U.S. 195 (1989), establishes that *Miranda* warnings issued to a suspect are not dependent upon the form in which they are articulated. In *Duckworth*, a suspect signed a waiver form that stated: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." *Id.* at 198. This warning was challenged on the grounds that it failed to adequately relate the suspect's rights under *Miranda* to appointed counsel before questioning.

The *Duckworth* Court found the challenged warning consistent with *Miranda* and instructed that "[r]eviewing courts ... need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Id.* at 203 (quoting *Prysock*, 453 U.S. at 361). Powell does not even acknowledge this oft-recited *Duckworth* language.

If the *Duckworth* warnings were subjected to the kind of analysis the Florida Supreme Court conducted, the outcome in *Duckworth* would clearly be different. The Florida Supreme Court's analysis would lead to the conclusion that the *Duckworth* warnings "misleadingly suggest" that the suspect would have *only* been entitled to counsel once he was arraigned. But this Court recognized that such formalism was inconsistent with the purposes of *Miranda*, embracing the principle that reviewing courts should analyze warnings in their "totality" to determine whether they

complied with *Miranda*. *See id.* at 205. Parsing warnings clause-by-clause is an unnecessary exercise, yet the Florida Supreme Court's constrained interpretation of *Miranda* does just that.

At bottom, *Miranda* was intended to address the inherently coercive nature of custodial interrogations. *Dickerson v. United States*, 530 U.S. 428, 435 (2000). However, *Miranda* warnings that provide "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process[.]" *Moran v. Burbine*, 475 U.S. 412, 427 (1986). The Tampa Police Department warnings apprised Powell of the adversarial nature of the custodial interrogation, informed him of the fact that any cooperation with law enforcement could subsequently be used against him in a court proceeding, that counsel would be appointed for him, and that he could assert his right to counsel at any time during his interrogation. *Cf. Colorado v. Spring*, 479 U.S. 564, 574 (1987) ("The *Miranda* warnings protect [the privilege against self-incrimination] by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time."). Under both *Prysock* and *Duckworth*, the warnings issued to Powell "reasonably conveyed" the requirements of *Miranda*.[5]

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[5] *See Withrow v. Williams*, 507 U.S. 680, 690 (1993) ("The *Miranda* Court did of course caution that the Constitution requires no 'particular solution for the inherent compulsions of the interrogation process'") (quoting *Miranda*, 384 U.S. at 467).

B. The Florida Supreme Court gave the warnings a technical and unrealistic meaning, and failed to consider them in their totality.

The Florida Supreme Court's highly unrealistic and overly technical reading of the warnings failed to consider them as a whole. Considered in their totality, the warnings are consistent with *Miranda's* dictates. In reaching a contrary conclusion, the decision below erred in several respects.

First, the Florida Supreme Court mischaracterized the meaning of the phrase "before answering any of our questions," reading out of that language the evident message that the suspect can consult with his attorney before each and every answer he is asked to provide. The plain meaning of "the right to talk to a lawyer before answering any of our questions" is that, upon being asked any question, the suspect may turn to his lawyer for help in answering it. That language alone therefore conveys the right to counsel during questioning. There is no basis for questioning whether that language also conveys the attorney's "physical presence" in the interrogation room. It defies common sense to conclude that, upon hearing these warnings, a lay suspect would conjure up a grand jury-like process, in which he would be shuttled in and out of the interrogation room to talk to his lawyer before answering each question. A reasonable listener would instead understand that his lawyer could be present in the interrogation room to serve the attorney's obvious purpose – to provide advice to the suspect in answering questions.

Second, the Florida Supreme Court all but ignored the phrase "at any time during this interview" by relegating it to an empty "catch-all" sentence. This warning confirms that the suspect's rights are available "at any time" – i.e., without any limit, restriction, or qualification, and specifically "during" the interrogation. Furthermore, understood in context, the phrase "during *this* interview" contemplates that the warning is provided at the time of interrogation. Even more clearly than the "at this time" language, that the courts of appeals have upheld, the warning that the suspect can use the right to counsel "during this interview" reasonably conveys to a suspect the *present* availability during questioning of access to an attorney. A suspect hearing that warning would not believe that the police were telling him about his rights in a *previous* (*i.e.*, "before questioning") phase of the process; rather, he would understand that the rights of which he was being informed – including the right to consult with a lawyer – applied at that moment, "during this interview."

Thus, even if one were to read the "before answering any of our questions" portion of the warning as not encompassing the right to counsel during the question-and-answer session, Powell's argument would still fail. If these warnings had said, "you have the right to talk to an attorney before answering any of our questions and at any time during this interview," there would be no dispute at all that the warnings would be adequate. Indeed, that is essentially the fix that the concurring opinion below suggested. *See* JA 175 ("You have the right to talk to a lawyer before answering any of our questions and *at any time during questioning*.") (Pariente, J., concurring). But such an unquestionably adequate

warning differs from the warnings here only because the Tampa warning separated the advice about the right to talk to an attorney "before answering any of our questions" and "during this interview" by a statement of the right to appointed counsel. The sole difference, in other words, is the order in which the rights were stated. But this Court in *Prysock* correctly concluded that the admissibility of a confession should not turn on the order in which the police state the *Miranda* warnings. 453 U.S. at 361 ("The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given.").

Third, and in any event, even if one accepted Powell's artificial and constricted reading of "before answering any of our questions" as meaning "before questioning," and even if one ignored the explicit advice that the suspect could use the right to talk to an attorney "at any time during this interview," the warnings nevertheless reasonably conveyed to Powell his ability to have counsel present during questioning. That is because, a suspect who understands that his right to counsel attaches prior to interrogation or "before questioning" realistically would not draw the highly counterintuitive inference that the attorney would be made unavailable once the first question is asked. As other courts have concluded, the natural and common-sense reading of these warnings is that an attorney who is provided even before questioning begins will continue to be available while questioning is underway.

Consequently, if the *Miranda* warnings read to Powell are read as a whole, they reasonably conveyed

to him his right to counsel during his custodial interrogation.

C. Federal courts are in sharp and longstanding disagreement about what language a *Miranda* warning must contain.

Powell contends that "every" federal circuit court of appeals to consider the issue has held that *Miranda* warnings similar to those issued to him violate the Fifth Amendment. Resp. Br. at 27; *see also id.* at 33 ("Federal courts of appeals considering warnings like the ones given Powell uniformly have held them defective."). Powell is manifestly incorrect in his reading of the case law.

Contrary to Powell's assertion, sharp disagreement exists among the courts on the principle at issue in this case. The Florida Supreme Court noted this disagreement. *See* JA 161 ("The federal courts are split regarding the necessity for express warnings of the right to have counsel present during interrogation."). The federal courts of appeals themselves have long and openly acknowledged a conflict concerning whether *Miranda* requires explicit advice of the right to the "presence of counsel during questioning." *See, e.g., Bridgers v. Dretke*, 431 F.3d 853, 859 (5th Cir. 2005) (that warnings similar to the ones in this case implicate "a split among the circuits with respect to whether the warning must explicitly provide that a suspect is entitled to the presence of counsel during interrogation"); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984) (noting that the "Second Circuit has deemed the omission of [presence-during-questioning language] insignificant, holding that Miranda is satisfied by the inferences that can be

drawn from" the surrounding advice, that "the Fifth Circuit, however, rejects this approach," and siding with the Fifth Circuit). And the very commentators on which Powell relies have similarly recognized that the question of what constitutes an adequate right-to-counsel warning is a matter of longstanding and ongoing dispute.[6]

Powell is flatly incorrect that the federal courts have "uniformly" rejected warnings akin to those provided to Powell. Resp. Br. 33. In fact, only the Ninth and Fifth Circuits have invalidated warnings that are "similar" to the one under review in the sense that their only alleged flaw was that they contained language informing the suspect that he could consult with counsel before answering questions, but did not explicitly state that the suspect could have an attorney present during the interrogation. Both of those circuits established that rule, moreover, before this Court's announcement in *Duckworth*, which set the standard for evaluating the adequacy of *Miranda* warnings. In *Noti*, the Ninth Circuit concluded that, "although the question is a close one," 731 F.2d at

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[6] *See, e.g.*, Daria K. Boxer, *Miranda with Precision: Why the Current Circuit Split Should be Resolve in Favor of a Uniform Requirement of an Explicit Warning of the Right to Have Counsel Present During Interrogation*, 37 Sw. U. L. Rev. 425, 431 (2008) ("In the absence of unequivocal Supreme Court Guidance, circuit courts remain split on the issue of whether the third *Miranda* warning must include an express reference to the right to have counsel present during interrogation."); Adam S. Bazelon, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning "You Have the Right to an Attorney,"* 90 Marq. L. Rev. 1009, 1019 (2007) ("Although *Miranda* and its progeny indicate that a suspect subjected to a custodial interrogation must be informed of his right to have an attorney, the circuits are split on whether this explicit warning is required.").

615, *Miranda* requires explicit advice of "the right to counsel during questioning," *id.* at 614.[7] The court therefore agreed with the Fifth Circuit's 1968 decision in *United States* v. *Windsor*, 389 F.2d 530, which invalidated warnings that advised the defendant of his "right to the services of an attorney before questioning."[8]

Contrary to Powell's contention, the decisions in *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968), *United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974), and *United States v. Tillman*, 963 F.2d 137 (6th Cir. 1992), did not resolve the adequacy of so-called "before questioning" warnings. To the contrary, the warnings in each of those cases were invalidated primarily on other grounds. In *Fox*, the challenged warning failed to include any reference to the right to appointed counsel. That omission, the Second Circuit later explained, "tainted the entire warning" and constituted the "most significan[t]" reason for the

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[7] In *United States v. Bland*, 908 F.2d 471 (9th Cir. 1990), decided after *Duckworth*, the Ninth Circuit simply concluded, without substantive discussion or mention of *Duckworth*, that it would "not retreat from *Noti*" and therefore invalidate a warning that "failed to include a statement that [the defendant] had a right to have an attorney present during questioning." *Id.* at 472-474.

[8] More recently, in *Bridgers v. Dretke* 431 F.3d 853 (5th Cir. 2005), the Fifth Circuit rejected on collateral review a challenge to warnings that stated: "You have the right to the presence of an attorney/lawyer prior to questioning." The court "recognize[d]" that its earlier decisions "remain[ ] binding precedent for cases on direct appeal in this Circuit," 431 F.3d at 859 n.4, but it noted the reasoning of other courts to the contrary and opined that *Miranda* does not answer the question "whether informing the suspect that he has a right to the presence of an attorney prior to questioning adequately conveys that counsel may remain during questioning." *Id.* at 859.

result in *Fox*. *See United States v. Lamia*, 429 F.2d 373, 377 (1970) (upholding warnings that informed the defendant that "he had a right to an attorney"). The Second Circuit has cast significant doubt on the aspect of *Fox* on which Powell relies. In *Lamia*, that court refused to endorse *Fox*'s reasoning regarding the presence-during-counsel component of the warnings, expressing no opinion as to "[w]hether this [analysis] was correct or not." *Id.* at 377. *Lamia* also concluded that, in general, *Fox* "represented too formalistic an approach to *Miranda*." *Id.; see id.* at 376 (rejecting a similar effort to seize on linguistic variations in the "right to remain silent" warning; concluding that the two formulations "mean substantially the same thing to any reasonable person" and that "[w]hile there may be philological distinctions, they surely would not occur to anyone at a time of arrest"). And the Second Circuit has squarely upheld warnings that advised the defendant of his right "to consult with a lawyer at *this* time." *United States v. Vanterpool*, 394 F.2d 697, 698 (2d Cir. 1968) (emphasis added); *United States* v. *Anderson*, 394 F.2d 743, 745 (2d Cir. 1968) (suspect told "he had a right to a lawyer at this time"); *cf.* JA 3 (advising the suspect of his ability to use the right to talk to an attorney "during this interview").

Oliver is even less supportive of Powell's position. In that case, the government did not even contend that the warnings were adequate under *Miranda*, because they "did not include advice that [the defendant] could remain silent" or the right to appointed counsel, and because the agents made no attempt to ascertain whether the defendant understood the warnings. *Oliver*, 505 F.2d at 304 & n.6, 305, 306. The issue in the case was instead whether the defendant was in *Miranda* custody at the time of the interrogation. The court's observations

that the "defendant was not told that he could have counsel present during the questioning" therefore were plainly dicta. *Id.* at 304 n.6. The Seventh Circuit has never questioned its holding in *United States v. Adams*, 484 F.2d 362 (7th Cir. 1973), that *Miranda* warnings need *not* contain explicit advice of the "right to have an attorney present during questioning." *Id.* at 361 (agreeing with the Second Circuit's decision in *Lamia, supra*).

Similarly, the decision in *Tillman* rested on the fact that "the Defendant was never told any statements that he would make could be used against him." *Tillman*, 963 F.2d at 141. The court concluded that this "troublesome" and "dangerous omission" doomed the warnings: "Of all the elements provided for in *Miranda*," the court reasoned, advice that statements will be used against the defendant "is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights." *Id.* The court concluded that, "by omitting this essential element," the warnings were inadequate because "a person may not realize why the right to remain silent is so critical." *Id.* At the end of that discussion, the court observed in a single sentence and without discussion that, "[i]n addition, the police failed to convey to defendant that he had the right to an attorney both before, during, and after interrogation." *Id.* Contrary to Powell's contention, that observation was hardly the basis for the court's decision, and it does compel the conclusion that the Sixth Circuit would necessarily reject the warnings at issue here.

The remainder of the decisions Powell cites as "uniformly ... hold[ing]" "similar" warnings defective, in fact *upheld* warnings that were *less* comprehensive

and informative than the ones at issue here. Resp. Br. 33. *See, e.g., United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996) (upholding warning which provided: "You have the right to an attorney. If you can't afford an attorney, the Government will get one for you."); *United States v. Caldwell*, 954 F.2d 496 (8th Cir. 1992) ("You have the right to an attorney. If you can't afford one, one will be appointed for you."); *see also Evans* v. *Swenson*, 455 F.2d 291 (8th Cir. 1972) (deeming adequate under *Miranda* the advice that "you have a right to make a phone call and you also have a right to an attorney").

Powell attempts to portray these decisions as "holdings" in favor of his position by seizing on statements to the effect that different warnings might be invalid if they were "affirmatively misleading." Resp. Br. 33. But he can make the sweeping assertion that the federal cases "uniformly" support his position only by converting decisions that *approve* of a general warning into decisions that implicitly *reject* other types of warnings that were not at issue. No principled basis exists for that inferential leap.

Finally, Powell's description of the federal case law requires him to ignore entirely a critical aspect of the warnings under review. Unlike the warnings in the decisions Powell discusses, in this case the warnings specifically advised Powell that the right to talk to a lawyer, like all the other rights of which he was informed, could be exercised "*at any time you want during this interview.*" JA 3 (emphasis added). Powell's predictions about how the courts of appeals would resolve this case thus rests on a fundamental mischaracterization of the warnings he received.

D. Reversal would not lead to dilution of *Miranda* warnings, but affirmance would encourage wasteful litigation.

Both Powell and *amici* assert that, if this Court were to reverse the Florida Supreme Court, law enforcement agencies would be encouraged to modify their warnings in an effort to hamper suspects' understanding of their Fifth Amendment rights. Resp. Br. at 50-51; Br. for *Amici* NACDL at 9, 20-24. Those predictions of a "race to the bottom" are flatly inconsistent with the available evidence.

The concern that law enforcement would react to this Court's decision by muddling the language contained in the *Miranda* warnings is mistaken. Experience does not bear out, and Powell has not established, the conclusion that upholding these warnings would cause law enforcement agencies to modify their approaches to *Miranda* in a way that compromises constitutional rights. No evidence exists, for example, that after *Duckworth* state and local jurisdictions adopted the "if and when you go to court" formulation, even though one could argue that such language would be more likely to procure a waiver than the standard formulation. Moreover, there is no evidence that in those federal circuits or state courts that currently permit a general "right-to-counsel" warning, law enforcement has stopped specifying in explicit terms that suspects have the right to consult before questioning and to have counsel present during questioning.

In fact, as the study Powell cites shows, the evidence is exactly the opposite: even though courts have upheld variant warnings, law enforcement

agencies tend to gravitate toward similar language. Resp. Br. at 42; *see also* Br. for Professor Richard Leo as *Amici Curae* Appendix. That practice makes sense: law enforcement agencies would risk losing convictions if they intentionally and significantly altered the *Miranda* warnings. The only incentive to change the warnings is the possibility of an increase in waivers by suspects. But an overwhelming percentage of suspects waive their rights even when they are provided the standardized and precise warnings.[9] The effect of changing the warning would simply be to place all of the statements resulting from those waivers at risk of suppression.

Indeed, the broader implications of this case are very different from what Powell emphasizes. A decision reversing the Florida Supreme Court would simply affirm the principle of *Duckworth* and *Prysock* that Miranda warnings should be read sensibly and non-technically.

Affirming the Florida Supreme Court's approach would render variants of *Miranda* warnings potentially deficient. To cite just two possible examples, a suspect informed only of his right to counsel "during questioning" would have a cognizable claim, and would certainly contend that he was not reasonably conveyed his right to counsel "before questioning."[10] A suspect told he had the right to

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[9] *See generally* Paul G. Cassell and Brett S. Hayman, *Police Interrogations in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. Rev. 839, 859, tbl. 3 (1996) (describing a waiver rate exceeding eighty percent).

[10] Notably, a compendium of various Florida jurisdictions *Miranda* warnings provided by *amici*, demonstrates that (Continued...)

counsel "at any time he wanted" could argue such a warning lacked clarity or specificity. The consequences of affirming would ultimately require reviewing courts to parse warnings clause-by-clause to determine whether they comported with federal constitutional strictures, a result that is inefficient and clearly disfavored under this Court's precedent.

E. Powell's attacks on the motivation for adopting the challenged warnings are unfounded and irrelevant.

Neither a factual nor a legal basis exists for Powell's accusation that the warning at issue was the result of the Tampa Police Department's efforts to circumvent *Miranda* or obscure the suspect's understanding of his rights. As a factual matter, the available evidence suggests exactly the opposite.[11]

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approximately 30 do not contain "before" or "prior to questioning" language concerning the right to counsel. Br. for Professor Richard Leo as *Amici Curae* Appendix.

[11] The warnings given to Powell were apparently adopted as a result of litigation ultimately resulting in the Florida Supreme Court's decision in *Thompson v. State*, 595 So. 2d 16 (Fla. 1992), which invalidated the previous version of Tampa warning on the ground that it did not adequately communicate the suspect's right to appointed counsel. As revised and administered to Powell, Form 310 is substantially less complex than the previous version (79 words versus 148) and more understandable because it does not contain the arcane and legalistic language of the prior form. *E.g.* (suspect "need not consent to be interviewed" or "required to make any further statement"; if suspect "desire[s] to consult with an attorney," "interview will terminate"). There is no basis at all for the inference Powell would ask this Court to draw from the change in the form.

This case does not present a circumstance resembling the one this Court confronted in *Missouri v. Seibert*, in which there was clear evidence that the challenged practice was deliberately designed to evade Miranda and was gaining in popularity. Because those concerns are not present here, the subjective motivation for adopting these warnings does not bear on whether they are constitutionally adequate. *See Moran*, 475 U.S. at 423 ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights.")

Requiring the suppression of Powell's inculpatory statement, notwithstanding fully adequate *Miranda* warnings, does nothing to advance the efficacy of law enforcement or adherence to *Miranda*, and gives short-shrift to countervailing interests "in punishing and incapacitating those who violate criminal laws." *Duckworth*, 492 U.S. at 207 (O'Connor, J., concurring). The Florida Supreme Court's express advice standard is untenable when one considers that in this case, law enforcement was placed in an identical position, from a legal standpoint, had Powell's confession been the product of outright physical coercion or had no warnings been provided at all. This standard misreads the Tampa Police Department warnings by construing them as involving two distinct phases of interrogation ("before" and "during" questioning). Common sense dictates that counsel would not disappear once questioning started.

Simply put, informing a suspect that he has the right to counsel before answering any question, and

that this right can be asserted at any point "during this interview" "reasonably convey[s]" the right to the presence of an attorney during questioning.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Florida Supreme Court.

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November 23, 2009

AMICUS CURIAE BRIEF

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(5)

Supreme Court, U.S.
FILED
SEP 3 2009
OFFICE OF THE CLERK

No. 08-1175

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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54UISN

QUESTION PRESENTED

Whether, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), a suspect is adequately informed of the right to the presence of counsel during custodial interrogation when he is told, "You have the right to talk to a lawyer before answering any of our questions" and "You have the right to use" that right "at any time you want during this interview."

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In the Supreme Court of the United States

No. 08-1175

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the standards for reviewing the constitutional adequacy of *Miranda* warnings and the precision with which such warnings must be stated. The United States has a substantial interest in those questions. As a matter of practice, federal law enforcement agents explicitly advise suspects of the right to the presence of counsel during questioning and do not employ the formulation of the warnings challenged here. Nevertheless, departures from routine practice occur from time to time. Moreover, the federal government often accepts for prosecution cases referred by state and local authorities, in which suspects have already been interrogated. The Court's analysis and resolution of the question presented in this case will therefore affect the ad-

missibility of defendants' statements in federal prosecutions.

STATEMENT

Following a jury trial, respondent was convicted in Florida Circuit Court of one count of possessing a firearm as a convicted felon, in violation of Fla. Stat. Ann. § 790.23(1) (West 2007). Fla. Dist. C.A. App. 41. He was sentenced to ten years of imprisonment. *Id.* at 44. The Florida Second District Court of Appeal reversed respondent's conviction on the ground that his confession should have been suppressed because of a deficient *Miranda* warning. J.A. 133-149. The Florida Supreme Court affirmed that decision. J.A. 150-181.

1. On August 10, 2004, Tampa police officers went to an apartment looking for respondent in connection with a robbery investigation. J.A. 151; Fla. Dist. C.A. App. 6. Officers saw respondent in an upstairs hallway coming from a bedroom and, inside the bedroom, they discovered a loaded nine-millimeter handgun. J.A. 20-22, 151-152.

The officers arrested respondent and transported him to the Tampa Police headquarters. J.A. 152. Before asking respondent any questions, one of the officers read him the applicable portion of the standard Tampa Police Department Consent and Release Form 310 (Form 310) (reprinted at J.A. 3). J.A. 152; see J.A. 22-25, 62-63. That form provides in relevant part:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any question-

ing. You have the right to use any of these rights at any time you want during this interview.

J.A. 3. Respondent signed the form, acknowledging that the officer had read him his rights, that he "underst[oo]d them," and that he was "willing to talk to" the officers. *Ibid.* Respondent then admitted that he owned the firearm found in the apartment. He stated that although he had purchased the firearm and carried it for his protection, he knew he was not permitted to possess the gun because he was a convicted felon. J.A. 29.

2. On August 31, 2004, respondent was charged in the Circuit Court of Florida with one count of unlawfully possessing a firearm after having been convicted of a felony offense, in violation of Fla. Stat. Ann. § 790.23(1) (West 2007). Fla. Dist. C.A. App. 7. At his jury trial, respondent testified that he had signed the Form 310 waiver at the police station and acknowledged that, in doing so, he understood that he was waiving his right "to have an attorney present during [his] questioning" by the police officers. J.A. 80. Respondent also admitted that he had told the officers that he owned the firearm found in the apartment, J.A. 80-81, but claimed that he had lied in order to protect his girlfriend from criminal charges arising from possession of the gun, J.A. 81-82. Respondent conceded, however, that he had no reason to believe that his girlfriend could not legally possess a firearm. J.A. 88-89. The jury found respondent guilty, and, after the State agreed not to seek a "habitual offender" enhancement based on his ten previous felony convictions, the court sentenced respondent to ten years of imprisonment. J.A. 8-9, 129-131; Fla. Dist. C.A. App. 37, 44.

3. The Second District Court of Appeal reversed respondent's conviction in a divided opinion. J.A. 133-149.

Over a dissent, J.A. 148-149, the court concluded that respondent's confession should have been suppressed because the *Miranda* warnings he received did "not unequivocally inform[] [him] that he had the right to the presence of an attorney during questioning," J.A. 142. Viewing the issue as one of "great public importance," the court certified to the Florida Supreme Court the following question: "Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer 'before questioning' and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" J.A. 137.

4. The Florida Supreme Court accepted jurisdiction and "answer[ed] the [certified] question in the affirmative." J.A. 151. After reviewing federal and state decisions addressing "the necessity for express warnings of the right to have counsel present during interrogation," J.A. 161, the court concluded that the warnings provided to respondent were invalid under *Miranda*. J.A. 170. The court reasoned that the warnings stated only that respondent could "talk with a lawyer before questioning" and "did not expressly indicate that [respondent] had the right to have an attorney present during questioning." *Ibid.* The court considered the language of the warnings "misleading" because, by negative implication, it suggested that the suspect "can only consult with an attorney before questioning" and not after the interview has begun. J.A. 171. The court also rejected the State's argument that the final sentence of the warning, informing respondent that he could use any of the stated rights "at any time * * * during this interview," reasonably conveyed the right to have counsel present during questioning. In the court's view, the final sentence

could "not supply the missing warning" because "a right that has never been expressed cannot be reiterated." J.A. 171-172.[1]

Justice Wells dissented. J.A. 177-180. In his view, the court "stretche[d] the plain language of the warning given in this case and ignore[d] the simple, straightforward requirements for a warning set out in *Miranda*." J.A. 178. Justice Wells asserted that the warnings provided to respondent would reasonably convey to "a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation." J.A. 179. He deemed it "patently unreasonable to conclude" that a suspect "would interpret the invitation to use 'any of these rights at any time you want *during* this interview' * * * to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement." J.A. 179-180. The court's contrary interpretation, Justice Wells argued, reflected "an extreme technical adherence to language * * * that has no connection with whether the [suspect] understood his or her rights." J.A. 180.

SUMMARY OF ARGUMENT

The warnings respondent received were constitutionally adequate, and the Florida Supreme Court therefore erred in ordering the suppression of his statements.

A. This Court has recognized that the *Miranda* framework affords significant benefits to the criminal justice system, and that, among its virtues, *Miranda*

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[1] Three Justices concurred in a separate opinion, J.A. 175-177, to urge the State Attorney General "or some other statewide law enforcement organization to create standard *Miranda* forms for use by police departments throughout the state that will withstand legal scrutiny." J.A. 176.

provides police and prosecutors concrete guidance about how to conduct interrogations constitutionally. *Miranda* is of greatest benefit to law enforcement when agencies routinely provide warnings in conventional and precisely articulated language. Because administering warnings in that manner serves the interests of law enforcement, all federal agencies do so as a matter of practice. For the same reason, state and local jurisdictions would be well advised to model their *Miranda* warnings on the federal formulation.

There is no basis, however, for suppressing any statement resulting from a *Miranda* warning that departs from a single standard form. Such a rule would increase the costs of the *Miranda* rule, requiring suppression in the significant number of cases where, for any one of several reasons, warnings vary from or contain less detail than the conventional phrasing. When the warnings reasonably convey the substance of *Miranda* despite such deviations, suppression of the suspect's voluntary statements has no basis in the purposes of *Miranda* and would impose serious obstacles to ascertaining the truth in criminal cases.

The goal of encouraging police to use conventional and precise warnings cannot justify suppression simply because warnings deviate from that pattern. Police already have ample incentives to use such warnings and no appreciable incentive not to do so. Thus, even without a rigid constitutional prohibition, law enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations. The federal experience confirms that logical conclusion. Although this Court and others have upheld variant warnings, federal law enforcement agencies have not responded by relaxing their *Miranda* practices.

B. The correct constitutional analysis thus looks to the substance of the warnings, not to their compliance with a particular form. This Court has prescribed a flexible, non-technical approach to evaluating the adequacy of the warnings provided. Under *California* v. *Prysock*, 453 U.S. 355 (1981) (per curiam), and *Duckworth* v. *Eagan*, 492 U.S. 195 (1989), the controlling inquiry is whether the warnings, read in their totality, reasonably convey the suspect's rights under *Miranda*. In evaluating whether an advice of rights accomplishes that objective, courts should not "examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Id.* at 203. Rather, courts should make a realistic judgment about how a suspect hearing the warnings would understand his options in the actual setting of interrogation.

C. The warnings in this case reasonably conveyed all of the *Miranda* rights. On the right to counsel, the warnings stated: "[y]ou have the right to talk to a lawyer before answering any of our questions," and "[y]ou have the right to use any of these rights at any time you want during this interview." J.A. 3. A suspect who hears those warnings would naturally conclude that he can talk to a lawyer before speaking to the police and that he can turn to his lawyer for help at any time during the interview before answering a question. The suspect would understand, in short, that he has a right to the presence of counsel during questioning.

The Florida Supreme Court's invalidation of these warnings resulted from two principal errors. First, the court subjected the warnings to the type of close textual parsing that this Court has rejected. Contrary to the decision below, a suspect hearing the warnings concerning his right to counsel would not infer any restriction

on his access to a lawyer during the interrogation. Rather, as courts that have applied a sensible approach to similar warnings have concluded, the suspect would understand that he has an unqualified right to counsel that continues throughout questioning, *i.e.*, that can be exercised "at any time you want during this interview."

Second, the court erroneously held that the warnings were inadequate because they did not include explicit advice of the right to the presence of counsel during questioning. A requirement of such explicitness cannot be squared with this Court's precedents. *Miranda* itself did not state the warnings with such detail, and it specifically approved a Federal Bureau of Investigation (FBI) formulation that advised the suspect of his right to counsel in general terms. In addition, *Duckworth* and *Prysock* rejected the analogous argument that warnings were inadequate because they failed to explicitly inform the suspect of a different feature of the right to counsel. Under the correct standard, the warnings provided in this case were sufficiently specific to satisfy *Miranda*.

ARGUMENT

THE *MIRANDA* WARNINGS IN THIS CASE ADEQUATELY INFORMED RESPONDENT OF HIS RIGHT TO THE PRESENCE OF AN ATTORNEY DURING QUESTIONING

The conventional phrasing of *Miranda* warnings, employed with minor variations by all federal law enforcement agencies, informs the suspect, "You have the right to talk to a lawyer for advice before we ask you any questions," and "You have the right to have a lawyer with you during questioning."[2] The warnings in this

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[2] FBI, U.S. Dep't of Justice, *No. FD-395, Advice of Rights* (Nov. 5, 2002) (*FBI FD-395*).

case conveyed those same rights by advising the suspect, "You have the right to talk to a lawyer before answering any of our questions," and "You have the right to use" that right "at any time you want during this interview." J.A. 3.

Federal law enforcement agencies adhere, as a matter of policy, to the conventional phrasing of the *Miranda* rights, thereby avoiding the kind of protracted litigation over warnings that occurred here. Federal agencies have adopted that policy because it represents sound law enforcement practice and fulfills the purposes of *Miranda* in the most efficient and effective manner. As many already do, state and local jurisdictions would similarly benefit from the adoption of conventional warnings along the lines used by federal agencies.

As a constitutional matter, however, the warnings read to respondent adequately advised him that he had the right not only to speak with counsel before questioning, but also to turn to his lawyer for help at any time, including during the interview. The warnings therefore fulfilled *Miranda*'s purpose of safeguarding the suspect's ability to exercise his right against compelled self-incrimination during custodial interrogation. Because the warnings were constitutionally sufficient, the Florida Supreme Court erred in ordering the suppression of respondent's confession.

A. Providing Suspects With Conventional And Precise *Miranda* Warnings Is A Sound Law Enforcement Practice, But Not A Constitutional Mandate

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a prophylactic rule to protect the right of an individual, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimina-

tion. Under that now-familiar rule, to generate statements admissible in the government's case-in-chief, any custodial interrogation must be preceded by four basic warnings: that the suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. Unless police provide those warnings or a "fully effective equivalent" and obtain a valid waiver, *id.* at 476, the suspect's statements are deemed involuntary and therefore inadmissible in the prosecution's direct case. *Dickerson* v. *United States*, 530 U.S. 428, 443-444 (2000).

The *Miranda* framework not only safeguards the rights of suspects, but also yields significant benefits to the criminal justice system. Before *Miranda*, courts evaluated the admissibility of confessions using an indeterminate test that turned on the totality of the particular circumstances. See *Dickerson*, 530 U.S. at 432-433 (describing pre-*Miranda* doctrine). *Miranda* replaced that fact-intensive inquiry with an easily applied, bright-line rule that, as this Court has repeatedly recognized, preserves judicial resources by promoting efficient resolution of admissibility disputes. See, *e.g.*, *Moran* v. *Burbine*, 475 U.S. 412, 425-426 (1986) (noting that "'[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application") (brackets in original) (citation omitted).

Miranda offers particular benefits to law enforcement by "'informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted." *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 718

(1979)); *Missouri* v. *Seibert*, 542 U.S. 600, 601 (2004) (plurality opinion) (noting that compliance with *Miranda* "produces a virtual ticket of admissibility"). Those benefits come at little administrative cost, because the basic warning/waiver requirement of *Miranda* is generally easy to apply. See *Withrow* v. *Williams*, 507 U.S. 680, 695 (1993) (since *Miranda*, "law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements"). Indeed, the *Miranda* doctrine "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. And, in the more than four decades since *Miranda* was decided, no compelling evidence has emerged establishing that its requirements significantly hinder the ability of law enforcement to obtain valuable confessions. See U.S. Br. at 32 n.23, *Dickerson*, *supra* (No. 99-5525) (acknowledging "lively debate" over *Miranda*'s impact on prosecution and conviction rates but noting that the social scientific evidence is "at best inconclusive").

Miranda is of greatest benefit to law enforcement when agencies train their officers to use standardized warnings that explicitly refer to each aspect of the suspect's rights. By using a conventional and precise formulation of the warnings, police can significantly reduce the risk that a court will later suppress the suspect's statement on the ground that the advice was inadequate. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984) (noting that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are

rare"). In addition, by instructing officers routinely to administer such warnings in the prescribed form, law enforcement agencies can minimize the incidence of error and avoid burdensome litigation about the validity of the unique formulation provided in any particular case.

The use of conventional *Miranda* warnings is thus a desirable police practice, and one that is in law enforcement's own interest to employ. For that reason, all of the forms used by the various federal law enforcement agencies explicitly advise the suspect of the full contours of each right, including the right to the presence of counsel during questioning.[3] State and local law en-

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[3] *FBI FD-395* ("You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning."); IRS, U.S. Dep't of the Treasury, *Doc. No. 5661-A, In-Custody Statement of Rights* (Mar. 2001) ("You have the right to consult an attorney before making any statement or answering any question, and you may have an attorney present with you during questioning."); Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Justice, *ATF Form No. 3200.4, Statement of Rights* (Sept. 2005) ("You have the right to talk to a lawyer before we ask you any questions and to have a lawyer with you during questioning."); DEA, U.S. Dep't of Justice, *DEA-13A, Oral Miranda Warnings Card*) ("You have the right to talk to a lawyer for advice before we ask you any questions, and to have him or her with you during the questioning."); U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, *Statement of Rights* ("You have the right to consult an attorney before making any statement or answering any questions. You have the right to have an attorney present with you during questioning."); U.S. Postal Inspection Service, USPS, *IS Form No. 1067, Warning and Waiver of Rights* (Mar. 2009) ("You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.").

forcement agencies would be well advised to adopt similarly precise and standardized warnings.[4]

2. Although "[t]his Court and others have stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness" of a statement," "[n]othing in these observations suggests any desirable rigidity in the *form* of the required warnings" as a constitutional matter. *California* v. *Prysock*, 453 U.S. 355, 359 (1981) (per curiam) (first emphasis omitted). Such a hardening of *Miranda*, with a consequential expansion of its exclusionary rule, would increase the costs of the *Miranda* framework without yielding any constitutionally based benefit.

a. Notwithstanding the general policies of law enforcement agencies, variations from the conventional *Miranda* warnings arise in a significant number of cases. That is so for several reasons. First, as this Court has recognized, agents not infrequently make mistakes, deviating from or omitting certain language in the prescribed formulation. "*Miranda* has not been limited to station house questioning, and the officer in the field

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[4] A cross-jurisdictional study of *Miranda* warnings recently concluded that the standard formulations used by local law enforcement agencies vary significantly in vocabulary, syntax, and length. See Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication And Vocabulary Analysis*, 32 Law & Hum. Behav. 124 (2008). But that study also appears to indicate that, despite such linguistic variations, the large majority of jurisdictions use warnings that explicitly articulate each aspect of the *Miranda* rights—including specifically the right to counsel during questioning— with at least as much precision and detail as the federal warnings. *Id* at 131 (indicating that nearly 97% of standard warnings surveyed specifically included advice about the right to counsel "during questioning" or "before and during questioning").

may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice, particularly if a suspect requests an elaboration of the warnings." *Duckworth* v. *Eagan*, 492 U.S. 195, 203 (1989) (citation omitted). Second, presumably to a greater extent than when *Miranda* was decided, warnings must often be translated into a wide range of languages for non-English speaking suspects. Errors in translation are inevitable. Compare, *e.g.*, *United States* v. *Yunis*, 859 F.2d 953, 958-959 (D.C. Cir. 1988) (upholding admissibility of statements despite omissions in Arabic translation of *Miranda* warnings), with, *e.g.*, *United States* v. *Perez-Lopez*, 348 F.3d 839, 847-848 (9th Cir. 2003) (holding statements inadmissible on the ground that, because of linguistic variations resulting from Spanish translation, the *Miranda* warnings were "susceptible to equivocation"). And third, *Miranda* warnings are now administered in circumstances that this Court likely did not anticipate when it issued that decision—particularly, in overseas interrogations. See, *e.g.*, *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 198-209 (2d Cir. 2008) (assuming that *Miranda*'s "warning/waiver" framework applies to interrogation by U.S. authorities of a suspect held overseas in foreign custody, and suggesting that warnings be tailored to that context by advising that local law might not permit the presence of counsel), cert. denied, 129 S. Ct. 2765, and 129 S. Ct. 2778 (2009).[5]

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[5] The warnings in this case were accurately read from the standard card issued by the Tampa police department. See pp. 2-3, *supra*. That fact, however, does not alter the analysis. The adequacy of a *Miranda* warning has never depended on whether the particular formulation was inadvertent or intentional, and the analysis the Court applies in this case therefore will also govern challenges to accidental deviations from

When, for any of these reasons, a particular advice of rights deviates from the conventional formulation either in content or specificity, there is no sound reason to suppress a suspect's statements as long as the warnings reasonably conveyed the essence of the rights under *Miranda*. Focusing on the precise wording of the warnings, at the expense of their substance, tends to obscure the basic point of *Miranda*: to ensure that a suspect is apprised of his rights so that he can make a knowing and intelligent decision whether to exercise them. See *United States* v. *Sanchez*, 859 F.2d 483, 485 (7th Cir. 1988) (noting that variations in the language used "are far less important than whether the differences threaten achievement of the purpose of the warnings"), cert. denied, 489 U.S. 1021 (1989). If the warnings accomplish that purpose in the basic manner *Miranda* requires, no basis "exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985).

b. The laudable goal of promoting uniformity and precision in the warnings cannot justify enlisting *Miranda*'s exclusionary rule to enforce a rigid adherence to a single script by the police. As explained above, police and prosecutors already have ample incentives to use precisely articulated warnings in a standardized format because of the safe harbor such warnings provide. And police have little countervailing incentive to deviate from the standard form, because doing so is unlikely to increase the confession rate. An adequate *Miranda* for-

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a conventional warning. See *Moran*, 475 U.S. at 423 ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights.").

mulation must inform the suspect of all his options in the interrogation room, see p. 18, *infra;* varying the specificity or form of the advice therefore presumably will not have a significant effect on the willingness of a suspect to waive his rights.[6] Thus, even without a rigid rule dictating the content of the warnings, police have strong reason to avoid the litigation risks associated with the adoption of novel *Miranda* formulations. *McNeil* v. *Wisconsin*, 501 U.S. 171, 181-182 (1991) (declining to adopt a constitutional rule for the sake of providing police with "a 'clear and unequivocal' guideline"; "police do not need our assistance to establish such a guideline; they are free, if they wish, to adopt it on their own.").

The federal experience has borne out this conclusion. As explained below, this Court in *Duckworth* and *Prysock* rejected any constitutional requirement of rigidity in the form of the warnings and upheld advice that differed from the conventional formulation. See pp. 17-20, *infra*. Federal law enforcement agencies, however, did

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[6] Nothing in the record suggests that the Tampa police department adopted the particular warnings at issue here for the purpose of undermining the protections of *Miranda*. The inclusion of a broad, "catch-all" warning, J.A. 172, advising the suspect that he may "use any of these rights at any time you want during this interview," J.A. 3, is not the type of language a law enforcement agency would use if its aim were to encourage the suspect's waiver of his rights. This case therefore does not present the type of situation at issue in *Seibert*, in which a majority of the Court concluded that the challenged practice was deliberately designed to skirt *Miranda* and was gaining in popularity because it had proved effective in achieving that goal. See *Seibert*, 542 U.S. at 609-613 (plurality opinion); *id.* at 618 (Kennedy, J., concurring in the judgment).

not alter their *Miranda* practices in response to those decisions.[7]

B. Warnings Are Constitutionally Adequate When, Read In Their Totality, They Reasonably Convey The Substance Of The *Miranda* Rights

Because *Miranda* warnings need to convey the substance of a suspect's rights, rather than conform to a particular phrasing, the constitutional adequacy of the warnings given to respondent should not turn on whether they explicitly mirrored the language in the *Miranda* opinion. Rather, the adequacy of the warnings should be evaluated under this Court's flexible and common-sense approach.

1. This Court has held that the warnings required by *Miranda* need not "be given in the exact form described in that decision." *Duckworth*, 492 U.S. at 202. *Miranda* itself disavowed any such requirement, explaining that the warnings it prescribed could be satisfied by a "fully effective equivalent." 384 U.S. at 476; see *id.* at 479; *Rhode Island* v. *Innis*, 446 U.S. 291, 297 (1980) (referring to "the now familiar *Miranda* warnings * * * or their equivalent"). The Court confirmed that understanding in *Prysock*, summarily reversing a state-

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[7] In *Dickerson*, the government argued that overruling *Miranda* entirely could pose the risk that some law enforcement agencies or personnel might relax their practices, modify the warnings, or even fail to warn at all. U.S. Br. at 37, *Dickerson*, *supra* (No. 99-5525). The same risk is not implicated when warnings that touch all the bases of *Miranda* and adequately inform the suspect of his rights remain mandatory. Under that rule, law enforcement agencies generally have little incentive to replace the conventional warnings with some other phrasing because doing so would increase both the risks of suppression and the litigation costs of defending any statement, but would not enhance the prospects of securing a confession.

court decision that "essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion." 453 U.S. at 355. Noting that the specific language in *Miranda* carried no "talismanic" significance, the Court explained that "the 'rigidity' of *Miranda*" does not "exten[d] to the precise formulation of the warnings given a criminal defendant." *Id.* at 359. See *Dickerson*, 530 U.S. at 441 n.6 ("[T]he Constitution does not require police to administer the particular *Miranda* warnings.").

Instead of requiring a "verbatim recital" of *Miranda*'s text, *Prysock*, 453 U.S. at 360, this Court has established a flexible standard for determining the constitutional sufficiency of a particular advice of rights. A reviewing court should focus on the basic substance of the advice and should not demand the use of specific words. "The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Duckworth*, 492 U.S. at 203 (brackets, internal quotation marks and citations omitted).

2. This Court's decisions indicate that, in determining whether a warning reasonably conveys the *Miranda* rights, courts should approach the inquiry in a commonsense manner, rather than by parsing the text in search of potential ambiguities. That approach is exemplified by *Prysock* and *Duckworth*, in which the Court squarely rejected efforts to subject *Miranda* warnings to the type of close textual analysis ordinarily reserved for statutory interpretation.

The warnings in *Prysock* informed the juvenile suspect that he had the right to counsel during questioning and the right to have counsel appointed if necessary, but between the description of those two rights, police also

informed the suspect of his right to have his parents present at the interview. 453 U.S. at 356-357. The lower court concluded that, because of the sequence of the warnings, the suspect was "not given the crucial information that the services of the free attorney were available *prior to the impending questioning*." *Id.* at 363 (Stevens, J., dissenting) (quoting Pet. App. at A15, *Prysock*, *supra* (No. 08-1846)). Similarly, in *Duckworth*, the defendant was warned that he had the right to the presence of counsel, but he was told that an attorney "will be appointed for you, if you wish, if and when you go to court." *Duckworth*, 492 U.S. at 198 (emphasis and citation omitted). Based on that language, the defendant contended that he "believed that he could not secure a lawyer *during* interrogation" and that nothing in the warnings explicitly informed him that he could. *Id.* at 200 (emphasis added) (citation omitted).

The Court rejected these arguments and upheld both of the challenged warnings. Emphasizing that *Miranda* was never intended to require any particular form of words, the Court explained that "[r]eviewing courts * * * need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Duckworth*, 492 U.S. at 203. The Court in *Duckworth* disagreed with the lower court's conclusion that the warnings were inadequate because of possible ambiguities in the literal text, *id.* at 203, and cited the dissenting judge's description of that analysis as "formalistic, technical, and unrealistic," *id.* at 200. And in both cases, the Court rejected the contention that the warnings were inadequate because they failed to "explicitly inform[]" the suspect of each specific aspect of the right to counsel. *Prysock*, 453 U.S. at 359; see *Duckworth*, 492 U.S. at 200-201 (rejecting the court of appeals' conclu-

sion that the challenged warning was inadequate because it "denies an accused indigent a clear and unequivocal [reference to] the right to appointed counsel before any interrogation"). Because the warnings in each case "reasonably 'convey[ed]'" the substance of the *Miranda* rights, *id.* at 203 (quoting *Prysock*, 453 U.S. at 361), and "touched all of the bases" of that decision, *ibid.*, the Court held both sufficient.

Prysock and *Duckworth* thus establish the basic principles governing a challenge to the admissibility of a statement based on a purported omission in the *Miranda* warnings. The defendant may not prevail solely by showing a deviation from "the precise language contained in the *Miranda* opinion." *Prysock*, 453 U.S. at 355. The relevant question is instead whether the warnings "touched all of the bases" of *Miranda*, such that a suspect in the actual setting of custodial interrogation would realistically understand his options. *Duckworth*, 492 U.S. at 203. That assessment requires that the reviewing court consider the warnings "in their totality," *id.* at 205, rather than parsing the possible meaning of each component in isolation. And although the suspect must be alerted to all of the rights identified in *Miranda*, including the right to the presence of counsel during questioning, the warnings need not explicitly state such a right when, construed as an integrated whole, they "reasonably convey" that meaning. *Id.* at 203 (brackets and citation omitted).

C. The Warnings In This Case Reasonably Conveyed The Right To The Presence Of Counsel During Questioning

Under the flexible approach exemplified by *Duckworth* and *Prysock*, the warnings in this case reasonably conveyed the substance of *Miranda* and therefore adequately safeguarded respondent's rights under the Fifth Amendment.

A reasonable suspect would understand from the warnings administered in this case that he was entitled to have counsel with him while he was being questioned. The warnings stated: "You have the right to talk to a lawyer before answering any of our questions," and "[y]ou have the right to use any of these rights at any time you want during this interview." J.A. 3. The first statement informed the suspect that he could talk with a lawyer before he answered any question posed to him, and the second statement confirmed that he could exercise that right at any time during the interview. A suspect who hears those warnings would naturally conclude: "I can talk to a lawyer before I talk to the police, and I can turn to my lawyer for help at any time during the interview before I answer a question." The suspect would understand, in short, that he has a right to the presence of counsel during questioning. Read "in their totality," the warnings therefore "reasonably convey[ed]" the information required by *Miranda*. *Duckworth*, 492 U.S. at 203, 205 (citation omitted).

The Florida court's decision invalidating the warnings resulted from two principal errors. First, the court parsed the text of the warnings in a formalistic and technical manner, rather than making a realistic judgment about how a suspect would comprehend the advice in the context of interrogation. Second, the court deemed the warnings deficient because they did not contain explicit

advice of the right to the presence of counsel during questioning. These two errors produced a counterintuitive interpretation of the warnings that bears little relationship to the meaning they would actually convey to a suspect.

1. Although the court purported to frame its review from the perspective of "a reasonable person in the suspect's shoes," J.A. 170, the court's actual analysis resembled the approach this Court rejected in *Prysock* and *Duckworth*. The court began by viewing the third sentence of the warnings in isolation and concluded that the advice to the suspect of his "right to talk to a lawyer before answering any of our questions" was "misleading." J.A. 171. According to the Court, that statement suggested, by negative implication, that the suspect had the right to counsel only until the police asked him any questions and lost that right as soon as the interview began. *Ibid.* Based on that interpretation, the court separately evaluated and dismissed the final sentence of the warnings, which advised the suspect that he had "the right to use any of these rights at any time you want during this interview." The court reasoned that this sentence made no substantive contribution to the warnings because "a right that has never been expressed cannot be reiterated." J.A. 172. In other words, the court gave an artificially narrow reading to the initial warning concerning the right to speak to a lawyer, which restricted such a right to the time before questioning; and the court then reasoned that the concluding warning that the suspect could use his rights "at any time" could not "cure the deficiency" because a suspect could not use "at any time during an interrogation a right he did not know existed." J.A. 171-172.

a. The court's textual analysis fails even on its own terms. The court misread the language it deemed most critical to its interpretation: The third sentence states that the suspect has "the right to talk to a lawyer before answering *any* of our questions," J.A. 3 (emphasis added); it does not state that the suspect has the right to talk to a lawyer "before questioning," J.A. 171. The difference is significant because the court concluded that "the 'before questioning' warning" implied a temporal restriction on when access to counsel was permitted—*i.e.*, during the period "before questioning" but not after questioning began. *Ibid.* ("The 'before questioning' warning suggests * * * that [the suspect] can *only* consult with an attorney before questioning.") (emphasis added). But the actual text of the warning contains no such limitation. By advising the suspect that he may talk to his lawyer "before answering any of our questions," the warning conveyed that the suspect could talk to his lawyer before providing an answer to any particular question. That right applies while the interrogation is underway.

In any event, the final sentence refutes any "implication—unreasonable as it may be—that advice concerning the right to counsel *before* questioning conveys the message that access to counsel is foreclosed *during* questioning." *M.A.B.* v. *State*, 957 So. 2d 1219, 1227 (Fla. Dist. Ct. App.) (per curiam) (en banc), review granted, 962 So. 2d 337 (Fla. 2007) (Table). That sentence confirms that the suspect can "use any" of the rights previously stated "at any time [he] want[s] during this interview." J.A. 3. The only reasonable interpretation of that language is that the suspect "could *at any time* during interrogation avail himself of the right to remain silent, the right to talk to a lawyer, and the right to ap-

pointment of counsel." *M.A.B* 957 So. 2d at 1227. That reading fulfills the court's obligation to read the warnings "in their totality." *Duckworth*, 492 U.S. at 205; see *M.A.B.*, 957 So.2d at 1227 n.6 ("There is a natural and logical progression from the *before* phrase of the warning to the *at any time* phrase—a progression from advising the suspect that he may invoke his right to counsel immediately to further advising him that he also can invoke the right to counsel after interrogation has begun."). Even the court's literal analysis is thus contrary to the plain meaning of the warning's text.

b. The more basic flaw in the court's approach, however, is that its textual interpretation of the warnings produces a result at odds with common sense. The Florida court's textual analysis yields the conclusion that, upon hearing the warnings in this case, a suspect would conjure one of two scenarios: either that he can talk to a lawyer at any time during the interrogation but must leave the interview room to do so (because the suspect has no right to the "presence" of an attorney); or that the lawyer, once provided, would be taken away before or immediately after the first question was asked (because the suspect has no right to counsel "during questioning"). Neither of those counterintuitive scenarios is likely to occur to a lay suspect told that he "has the right to talk to a lawyer before answering any of our questions" and that he can use that right "at any time [he wants] during this interview." Such a suspect would instead understand from those warnings, consistent with *Miranda*, that he has the right to turn to his lawyer for help as he is called upon to answer questions. And such a suspect thus has the basic information necessary under *Miranda* for him to make a knowing and intelligent

decision whether to exercise his Fifth Amendment rights.

Courts that have applied the sensible and realistic approach exemplified by *Prysock* and *Duckworth* have recognized the implausibility of the Florida court's reading. In *People* v. *Wash*, 861 P.2d 1107, cert. denied, 513 U.S. 836 (1994), the California Supreme Court addressed similar warnings that, in an inadvertent departure from the prescribed form, advised the suspect that he had "the right to have an attorney present before any questioning." *Id.* at 1118. Like respondent, the defendant in that case challenged the warnings as "inadequate because they failed to inform him that he was entitled to counsel during questioning." *Ibid.* The court recognized that under *Miranda* "a suspect must be apprised, inter alia, that he has the right to the presence of an attorney during questioning," but the court concluded that the "warnings given defendant here 'reasonably conveyed'" that right. *Id.* at 1119. The court explained:

> Although the warning given to defendant here deviated from the standard form in failing to expressly state that defendant had the right to counsel both before and *during* questioning, we are not persuaded—as defendant's argument implies—that the language was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began.

Id. at 1118-1119. See, *e.g.*, *People* v. *Lujan*, 112 Cal. Rptr. 2d 769, 778-779 (Ct. App. 2001) ("It is unreasonable to conclude that if counsel was present before questioning that the attorney would be excluded from the interrogation room once the interview began"; the infer-

ence "that the right to counsel exists only before but not during questioning would be unreasonable to say the least."); *People* v. *Valdivia*, 226 Cal. Rptr. 144, 148 (Ct. App. 1986) ("While the warning * * * deviated somewhat from the accepted form, we are unpersuaded that the words were facially ambiguous or would have caused most people to believe counsel would only be provided before questioning and then whisked away once it began. A far more reasonable interpretation of the disputed language is that [the suspect] had the unfettered right to consult with and have counsel physically present before and at the interrogation.").

The warnings at issue here are even stronger than those in *Wash* for two reasons. First, these warnings stated that the suspect had the right to consult with counsel "before answering any of our questions," rather than "before any questioning," and therefore could not plausibly be construed as implicitly dividing the interrogation process into two distinct phases (before and during interrogation) and restricting the right to counsel only to the first phase. Second and more importantly, the warnings here specifically included a statement that the suspect could "use any of these rights"—including the right to consult with counsel—"at any time you want during this interview." J.A. 3. That warning eliminated any inference that counsel could not be present after the interview commenced.[8] The Florida Supreme Court

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[8] For the same two reasons, the warnings here are more robust than those at issue in *Bridgers* v. *Texas*, 532 U.S. 1034 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari). The *Bridgers* warnings, which three Members of this Court suggested were insufficient under *Miranda*, advised the suspect that he had "the right to the presence of an attorney/lawyer prior to any questioning" and did not

thus erred in holding that these warnings failed to convey a right to the presence of counsel that continued through questioning.

2. The Florida court erred in a second respect by insisting on an unduly high level of precision in the *Miranda* warnings. The court held that the warnings in this case were inadequate in part because they did not state in explicit terms that the right to counsel specifically includes the right to have counsel present during interrogation. Such a requirement conflicts with decisions of this Court—most notably *Miranda* itself—that indicate that pre-interrogation warnings can convey the full content of the right to counsel without expressly referring to each of its components.

a. The decision below appears to presuppose that *Miranda* warnings must include language specifically advising the suspect of the "presence-during-questioning" aspect of the right to counsel. The question certified for the court's resolution was whether the challenged warnings violated *Miranda* because they "fail[ed] to provide express advice of the right to the presence of counsel during questioning." J.A. 150-151. The court "answered th[at] question in the affirmative." J.A. 151. Numerous times in its decision, the court framed the relevant issue as "whether *Miranda* requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation." J.A. 164; see J.A. 165 (addressing defendant's argument that the "warnings did not specifically inform [him] of the right to have counsel present during police questioning"); J.A. 161 (noting split of authority about

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include any statement about the use of that right during the interview. *Ibid.* (citation omitted).

"the necessity for express warnings of the right to have counsel present during interrogation"); *ibid.* (discussing cases addressing whether "a suspect is entitled to be expressly informed of the right to have counsel present during questioning"); J.A. 162, 163; J.A. 166 (stating that the issue is "whether an individual must be expressly informed of his right to the presence of counsel during custodial interrogation"). While the court's invalidation of the warnings in this case rested largely on the conclusion that the warnings were "misleading" because of the purported negative implication of the "'before questioning' warning," J.A. 171, see pp. 22-24, *supra*, the court also indicated that the warnings were inadequate because they "did not expressly indicate that [respondent] had the right to have an attorney present during questioning," J.A. 170.

b. This Court's precedents refute any requirement that advice about the right to counsel must specifically refer both to the attorney's "presence" and to the suspect's ability to secure the assistance of counsel "during questioning." *Miranda* itself did not mandate such detail. In the critical portion of that decision, the Court explained that the suspect must be told, *inter alia*, that he has "the right to the presence of an attorney," without any elaboration that the right applies both before and during interrogation. *Miranda*, 384 U.S. at 479. See *Dickerson*, 530 U.S. at 435 (stating the "four warnings" that "have come to be colloquially known as '*Miranda* rights'[] are: * * * that [the suspect] has the right to the presence of an attorney").

The decision in *Miranda* also specifically recognized the adequacy of warnings that referred neither to the "presence" of the attorney nor to the applicability of that right "during questioning." The Court discussed at

length the FBI's longstanding practice of advising suspects of their constitutional rights before interrogation and concluded that discussion by approving of the way in which the FBI formulated its warnings. *Miranda*, 384 U.S. at 483-484. Quoting a letter submitted by the Solicitor General reporting the practice of the FBI, the Court explained that "[t]he standard warning long given by Special Agents of the FBI * * * is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court." *Id.* at 484; *ibid.* (noting that in 1964 the FBI also began advising the person "of his right to free counsel if he is unable to pay").[9] Notwithstanding the generality of that advice of the right to counsel, the Court specifically stated that this description of the FBI warnings "makes it clear that the present pattern of warnings * * * followed as a practice by the FBI is consistent with the procedure which we delineate today." *Id.* at 483-484.

Duckworth and *Prysock* confirm the principle that warnings about the right to counsel need not specifically refer to each aspect of that right. In both of those decisions, the Court rejected the contention that the warn-

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[9] The Solicitor General's letter quoted answers provided by the FBI concerning the warnings given, in which the FBI stated that examples of its warnings appeared in *Westover* v. *United States*, 342 F.2d 684 (9th Cir. 1965), and *Jackson* v. *United States*, 337 F.2d 136 (D.C. Cir. 1964). See *Miranda*, 384 U.S. at 484. In *Westover*, the court of appeals stated that the FBI advised the suspect "that he had the right to consult an attorney." 342 F.2d at 685. (The actual text of the advice in *Westover* stated, in language similar to the warnings at issue here, that the suspect "had a right to see an attorney before he made the statements." U.S. Br. at 9, *Westover* v. *United States*, 384 U.S. 436 (1966) (No. 761)). In *Jackson*, the warning informed the suspect that he "was entitled to an attorney." 337 F.2d at 138.

ings were inadequate because the suspect "was not explicitly informed" of one feature of the right to counsel—that he was entitled to "have an attorney appointed *before questioning.*" *Prysock*, 453 U.S. at 359 (emphasis added); see *Duckworth*, 492 U.S. at 200 (rejecting the court of appeals' conclusion that the challenged formulation "denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation") (citation omitted). The decision below deemed the warnings inadequate on the analogous ground that they failed to "explicitly inform" the suspect of a different feature of the right to counsel—that he could have counsel present *during* questioning. That reasoning conflicts with *Duckworth*'s instruction that the relevant question is whether the warnings "reasonably convey" the *Miranda* rights, not whether they explicitly do so.[10]

c. Under these principles, the warnings in this case more than satisfied minimum constitutional requirements. If the simple advice that the suspect has a "right

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[10] This Court did not establish a different standard in *Fare*, *supra*, by referring to *Miranda* as requiring the State to "warn the accused * * * of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." 442 U.S. at 717. In *Fare*, the adequacy of *Miranda* warnings was not at issue. That case instead concerned the question whether a juvenile defendant validly invoked his right to silence or counsel by asking to speak to a probation officer. *Id.* at 723-724. The Court mentioned the *Miranda* warnings only to contrast the invocation of the right to counsel with the request for some other "trustworthy" figure, *id.* at 717, 723, and therefore did not purport to address or establish the specific language that must be used to convey the suspect's *Miranda* rights. In any event, even if *Fare* were read to suggest such a requirement of explicitness in the warnings, that rule would not withstand this Court's subsequent decisions in *Prysock* and *Duckworth*.

to counsel" is sufficiently specific to convey the suspect's rights under *Miranda*, then the warnings here cannot be deemed too general. For the reasons explained above, there is no basis to distinguish the warnings in this case from a general "right-to-counsel" statement on the ground that they imply a temporal qualification on the lawyer's presence. See pp. 22-27, *supra*. To the contrary, the warnings at issue are distinguishable from the FBI formulation approved in *Miranda* only because they are substantially more specific, detailed, and informative. By advising the suspect both that he can "talk to a lawyer before answering any of our questions" and that he can use that right "at any time you want during this interview," the warnings specifically link the assistance of counsel to the interrogation process. The Florida Supreme Court therefore erred in deeming these warnings deficient for failing explicitly to advise the suspect of the right to the presence of counsel during questioning.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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SEPTEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1175

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,
v.
KEVIN DEWAYNE POWELL,
Respondent.

On Writ of Certiorari to the Florida Supreme Court

BRIEF FOR THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

The Florida Association of Criminal Defense Lawyers ("FACDL"), an independent affiliate of the National Association of Criminal Defense Lawyers, is a non-profit corporation with a membership of over 1,500 attorneys and 23 chapters throughout the state of Florida. FACDL's members are all practicing criminal defense attorneys committed to preserving fairness within Florida's criminal justice system and ensuring due process for suspects and defendants accused and convicted of committing crimes.

The questions presented in this case have important implications for all Florida criminal defendants.

SUMMARY OF ARGUMENT

The Florida Supreme Court held that the *Miranda* warning in this case was insufficient because a "reasonable person in the suspect's shoes" would have understood it to mean that he had a right to counsel solely *before*, and not *during*, interrogation. *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008). Thus, in

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[1]No counsel for a party authored this brief in whole or in part. No person or entity other than FACDL and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both Petitioner and Respondent have consented to the filing of this brief and, pursuant to Rule 37.3(a), FACDL has filed the letters of consent with the Clerk of the Court.

addition to the plain language of the warning itself, the "reasonable person in the suspect's shoes" becomes a term of paramount importance.

FACDL maintains that despite the Petitioner's and the Solicitor General's interpretations, Brief of Petitioner at 17-9 ["Pet. Br."]; Brief of Solicitor General at 21-4 ["SG Br."], the plain language of the warning excludes any possible inference that the right to counsel extended throughout questioning. However, even assuming such interpretation were possible, the literacy skills of the United States prison population suggest that very few suspects encountering Mr. Powell's warning would have the capacity to make the complex inference required. That is, a small minority of prisoners would have the tools to infer that contrary to the warning's provision limiting the right to counsel to *before* questioning, the catchall provision could be applied to negate that limiting language and expand the right to counsel to apply "at any time . . . during questioning."

Second, the "inherently compelling pressures" present in stationhouse interrogations and relied on by this Court, in part, to justify the warnings requirement, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), are no less significant today than they were when the Court decided *Miranda*. Furthermore, compelling, albeit limited, research demonstrates that those pressures not only make it less likely that a reasonable person in the suspect's shoes will invoke his rights without a warning, *id.*, they make it more difficult for that person to *comprehend* complex warnings. Thus, in order to ensure that the procedural protections guaranteed by *Miranda* have any force at all, warnings must be given in such a way that

complex inferences of the sort urged by Petitioner are not required to give *Miranda* warnings their full effect.

Finally, the overrepresentation of racial and ethnic minorities in the criminal justice system has increased exponentially in recent decades, leading to a well-documented distrust of law enforcement by these communities. This perspective is likely to shade how a reasonable person in the suspect's shoes (now increasingly minority) views a *Miranda* warning like the one at issue here – that is, he is more likely to take the "before" questioning language at face value, rather than to infer a more expansive right suggested by the catchall language at the end of the warning.

FACDL argues that when literacy rates, the conditions of interrogation and the distrust that marks a growing minority suspect population are considered, the warning in this case was not adequately unambiguous to convey the full effect of the right to counsel to a "reasonable person in the suspect's shoes." Accordingly, the Florida Supreme Court's decision below should be affirmed.

ARGUMENT

"Clarity Can Only Be A Virtue."[2]

In *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966), the Court held that a suspect subject to custodial interrogation must be informed in "clear and unequivocal terms" that he has the right to remain silent and the right to the presence of counsel. In the

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[2]WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 79 (3d ed. 1979)

instant case, the "clear and unequivocal terms" used by law enforcement officials informed Mr. Powell that he had a right to counsel *before* the interrogation ("You have the right to talk to a lawyer before answering any of our questions"). As explained by the Florida Supreme Court, "[t]he 'before questioning' warning suggests to a reasonable person in the suspect's shoes that he or she can only consult with an attorney before questioning." *State v. Powell*, 998 So. 2d 531, 541 (Fla. 2008).

Although a catchall provision was administered at the end of the warning stating, "You have the right to use any of these rights at any time you want during this interview[,]" the Florida Supreme Court correctly found that this sentence did "not effectively convey to Respondent his right to the presence of counsel before and during police questioning," because it "could not effectively convey a right the defendant was never told he had." *Id.*

Petitioner urges this Court to overturn the Florida Supreme Court's well-reasoned and straightforward conclusion, calling it a "hypertechnical approach" that "mires the common sense reasoning of this Court by engaging unnecessarily in semantics." Pet. Br. at 17. The Florida Supreme Court's approach is far from hypertechnical. It merely analyzes the plain language of the warning, concluding that it misleadingly suggests a limitation on Mr. Powell's right to counsel during interrogation. The decision recognizes, consistent with social scientists who study *Miranda* comprehension, that warnings should be simple and clear. When crafted in this way, as the Solicitor General points out, the warning becomes a very effective law enforcement tool because it

"'produces a virtual free ticket of admissibility.'" SG Br. at 10-11 (*quoting Missouri v. Seibert*, 542 U.S. 600, 601 (2004) (plurality opinion)).

The Tampa Police Department chose not to take advantage of this "free ticket." *See* Brief of Richard A. Leo at Section II. ["Leo Br."] The result is not simply a warning that failed to inform Mr. Powell he had a right to counsel during interrogation, but one that implied he did *not* have such a right, because it informed him specifically that he had a right to counsel *before* questioning.[3] Thus, the irony is that had the warning been *less* restrictive–had it left out the word "before," Petitioner might well have argued convincingly that the right to counsel was included in the catchall and applied at any time during the interview. To assume that Mr. Powell simply ignored the term "before" once he heard the catchall at the end, however, defies not only the plain language of the warning but assumes a level of analysis from Mr. Powell that very few people in the general population possess – even outside of the context of interrogation and all the pressures that it entails. If one looks at the subset of individuals likely to find themselves in an interrogation room and ultimately in prison, combined with the stress that comes with the attendant circumstances of an interrogation, *see* section I(B), *infra*, the likelihood of such a fine-tuned analysis, even assuming its correctness, is virtually non-existent.

Since this Court's "clear and unequivocal"

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[3]FACDL notes the legal maxim *expressio unius est exclusion alterius*, which means "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990).

mandate, numerous studies have examined whether criminal defendants are, in fact, understanding their *Miranda* rights. *See, e.g.*, Richard Rogers et al., *The Language Of* Miranda *Warnings In American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124 (April 2008); Richard Rogers, *A Little Knowledge is a Dangerous Thing: Emerging* Miranda *Research and Professional Roles for Psychologists*, 63 American Psychologist 776 (2008); Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers*, 31 Law & Hum. Behav. 177 (2007). These studies have focused on criminal defendants generally and on particular subcategories of defendants, such as juveniles,[4] "mentally disordered defendants,"[5] and non-English speaking defendants.[6] Though they may focus on different aspects of the warnings used in various jurisdictions, the one conclusion on which all of the studies agree is that the clarity of *Miranda* warnings matters. In addition, then, the literacy skills of the "reasonable person in the suspect's shoes," who will be interpreting those warnings, also matters. *Cf. Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (relying in

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[4]Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 Psychol. Pub. Pol'y & L. 63 (2008).

[5]Richard Rogers et al., *Knowing and Intelligent: A Study of* Miranda *Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401 (2007).

[6]Richard Rogers et al., *Spanish Translations of* Miranda *Warnings and the Totality of the Circumstances*, 33 Law & Hum. Behav. 61 (2009).

part on statistics regarding low literacy skills of Michigan prison population to support holding that indigent appellants in that state cannot effectively represent themselves on appeal).

Studies in recent years also have confirmed with greater breadth the assumption on which the *Miranda* Court relied several decades ago – that custodial interrogations involve "inherently compelling pressures" that may undermine a suspect's ability to exercise his right to remain silent. Thus, the warnings serve as a critical procedural safeguard. *Miranda*, 384 U.S. at 467. What is new since *Miranda*, however, is evidence that law enforcement officers today are armed with even more refined tactics for eliciting confessions, tactics so effective that a startling percentage of suspects have been proven to confess to crimes they did not commit. Rogers et al., *A Little Knowledge Is A Dangerous Thing, supra* at 782; Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2-4 (Jan. 2004); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 986 n.38 (1997).

Additional research demonstrates that the presence of stress that accompanies an interrogation may not only reduce a suspect's ability to invoke his rights, but it will also reduce his ability to *comprehend* them. Thus, not only must warnings be given, they must be administered with absolute clarity and simplicity if they are to serve any purpose at all.

A third factor bears consideration in light of recent demographic changes in the populations most likely to come in contact with the criminal justice system. While racial and ethnic minorities have always been disproportionately represented in the

system to some extent, this overrepresentation has jumped dramatically the past several decades. One result has been a well-documented distrust of law enforcement by minority communities. Studies demonstrating such systemic distrust challenge Petitioner's and the Solicitor General's unsupported contention that a criminal suspect, when subjected to custodial interrogation and all its attendant psychological intimidations and pressures, *see Miranda*, 384 U.S. at 467, will assume he has a right of which he has not explicitly been advised.

When taken together, these factors as applied to the warning in the instant case, yield the inescapable conclusion that Petitioner failed to meet its burden in establishing that Mr. Powell's Fifth Amendment right against self-incrimination was protected in this case.

A. The "Reasonable Person In the Suspect's Shoes" Requires Plain, Straightforward Warnings to Allow for Optimal Understanding.

The *Miranda* Court required not only that a warning be given, but that any waiver be made knowingly and intelligently. We now have far more information than we did in the 1960s about the ways in which various characteristics might affect a likely suspect's understanding of *Miranda* warnings. The findings suggest that only the most straightforward, "clear and unequivocal" warning can properly convey a suspect's Fifth Amendment rights in such a way as to produce a constitutional waiver.

The United States Department of Education

conducted its *National Assessment of Adult Literacy in Prison Survey* in 2003. While in the last ten years, the prison population overall has become more educated, the percentages of undereducated inmates is still very high. "In 2003, some 9 percent of prison inmates dropped out of school before starting high school and 28 percent started high school but did not obtain a diploma or a General Educational Development (GED) credential/high school equivalency certificate[.]" U.S. Dept. of Ed., National Center for Education Statistics, *Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey* 11 (May 2007) (NCES 2007-473), available at http://nces.ed.gov/pubs2007/2007473.pdf.

More importantly, the minimal literacy rates of this population generate much concern. The study tested for literacy using three mechanisms: prose literacy, document literacy, and quantitative literacy. *Id.* at 3. For purposes of *Miranda* warnings, which can be conveyed in either oral or written form, but do not involve quantitative analysis, the first two are relevant. Individuals in the study were grouped according to four categories of literacy: Below Basic, Basic, Intermediate, and Proficient. *Id.* at 3-4.

Below Basic prose and document literacy may indicate, at the bottom end, illiteracy in English, and at the top end, "locating easily identifiable information in short, commonplace prose texts" and/or "locating easily identifiable information and following written instructions in simple documents" such as charts or forms. *Id.* at 4, Tbl. 1-3.

Basic prose and document literacy provide a measure of an individual's capacity to "read[] and understand[] information in short, commonplace prose

texts" or in "simple documents[.]" *Id.* The Intermediate prose and document literacy categories demonstrate skills in "reading and understanding moderately dense, less commonplace prose texts as well as summarizing, making simple inferences, determining cause and effect, and recognizing the author's purpose," among others. *Id.*

Finally, an individual who scores in the Proficient prose and/or document literacy range(s) is "reading lengthy, complex, abstract prose texts as well as synthesizing information and making complex inferences[.]" *Id.* He may also be "integrating, synthesizing, and analyzing multiple pieces of information located in complex documents." *Id.*

In 2003, sixteen percent of the adult prison population (200,000 inmates) had Below Basic prose literacy, and twenty-two percent had Below Basic document literacy. *Id.* at 13, Fig. 2-2. Forty percent had Basic prose literacy and thirty-five percent had Basic document literacy. *Id.* This left less than half the prison population in either the Intermediate or Proficient prose or document literacy categories. *Id.*[7]

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[7]The Department of Education's survey compared literacy levels among adults in prison with literacy levels among the adult household population. "Prison inmates had lower average prose, document, and quantitative literacy than adults living in households." *Id.* at 29, Fig. 3-1. A higher percentage of prison inmates (thirty-nine percent) than adults living in households (twenty-one percent) had Below Basic quantitative literacy. *Id.*, Fig. 3-2. A lower percentage of prison inmates (two-to-three percent) than adults living in households (thirteen-to-fourteen percent) had Proficient prose, document, and quantitative literacy. *Id.*, Fig. 3-2. "A lower percentage of adults in prison than adults living in households had Intermediate document or quantitative

For black inmates, the statistics are even more stark: only thirty-eight percent of black incarcerated adults possess Intermediate or Proficient prose literacy, compared with forty-four percent overall. Forty-one percent of black incarcerated adults have Intermediate or Proficient document literacy, compared with fifty percent of the overall population. *Compare Literacy Behind Bars, supra* at 13, Fig. 2-2 *with id.* at 15, Fig. 2-4.

The study shows that although having a high school diploma increases the likelihood of reaching the Intermediate or Proficient literacy level slightly, it by no means guarantees it. Indeed, only slightly more than half, or fifty-seven percent, of inmates with a GED or high school equivalency diploma possessed these levels of prose literacy in 2003. Inexplicably, the percentage was even lower for inmates who had actually attended and graduated from high school – fifty-two percent. *Id.* at 17, Fig. 2-6. For document literacy, the figures were sixty-two percent for GED recipients and fifty-seven percent for high school graduates. *Id.*; *see also* Daniel P. Greenfield et al., *Retrospective Evaluation of Miranda Reading Levels and Waiver Competency*, 19 Am. J. of Forensic Psychol. 75, 79-80, n.45 (2001) (noting the importance of differences between an individual's highest achieved grade level and his literacy skills).

In addition to below average literacy levels among likely criminal suspects, one must also consider the method by which the warning is given. Already low comprehension levels drop dramatically when

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literacy . . . ." *Id.*, Fig. 3-2.

police read warnings to suspects orally. Richard Rogers, *A Little Knowledge is a Dangerous Thing*, *supra* at 780 ("As an overall trend, oral advisements failed to be comprehended much more frequently than their written counterparts by recently arrested detainees.").

The notion that popular understanding of *Miranda* fills these gaps is a myth. As Rogers and his co-authors point out, despite our inundation through popular culture with the *Miranda* warnings, exposure does not necessarily yield understanding:

> We can easily imagine open incredulity at any assertion that a particular defendant did not know that the right to silence meant he or she was under no obligation to communicate further with the authorities. Anecdotally, informal surveys suggest that college students do not understand the term "right" as a *protection*. Instead, the large majority of students construed "right" as simply an *option*, but an option for which they will be severely penalized (i.e., their non-cooperation will be used in court as incriminating evidence).

Rogers, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, *supra* at 190.[8]

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[8]It is a commonly-held belief that *Miranda* rights are so omnipresent in pop culture today that not only do most Americans recognize them, they can recite them. They hear them night after night on the myriad of police shows such as *Law & Order* and *CSI* and their various off-shoots. This is largely a myth, however. One recent study revealed that almost sixty-four percent of college

FACDL submits that regardless of his literacy or education level, a suspect would not understand the statement that "[y]ou have the right to talk to a lawyer before answering any of our questions" to mean that he has the right to have a lawyer present *during* an interrogation, even when followed by the catchall clause on which Petitioner so heavily relies. *Cf.* Rogers, *An Analysis of Miranda Warnings and Waivers*, *supra* at 190 ("Incomplete though accurate information has a real potential to mislead custodial suspects."); Rogers, *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, *supra* at 65 (criticizing translated warnings where suspect told that "legal counsel can be available *before* the interrogation" rather than "before and during" because "this error essentially nullifies a key feature of the ongoing nature of Constitutional protections"); Rogers, *The Comprehensibility and Content of Juvenile Miranda Warnings*, *supra* at 81-82 ("Warnings that

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undergraduates displayed at least two deficits in *Miranda* understanding. Richard Rogers et al., *Myths, Methods, and Model Solutions*, 23 Crim. Just. 4, 5 (Summer 2008) (*citing* Richard Rogers et al., *Advances in the Assessments of Miranda, symposium presentation*, American Psychology-Law Society (March 6, 2008)). Almost twenty-eight percent did not know that the Constitution guaranteed the right to silence and believed that failing to cooperate would be later viewed and used against them as incriminating evidence. *Id.* at 5. Over thirty-five percent believed that police could continue interrogation after an individual requested counsel. *Id.* at 5. Almost twenty-four percent believed a *Miranda* waiver had to be signed in order to be valid. *Id.* Thus, despite the prevalence of *Miranda* warnings in society today, such saturation does not translate into adequate knowledge and comprehension of such warnings.

misinform the defendant about the right to have an attorney present during questioning do not satisfy the requirements of *Miranda*.").

However, even assuming, *arguendo,* that the plain language of the warning given to Mr. Powell does not irretrievably limit the right to counsel to before questioning, the interpretation urged by Petitioner would require that a suspect have the ability to make complex inferences that are likely far beyond the reach of the average criminal suspect. Under Petitioner's view, suspects could understand the full breadth of their right to counsel during interrogation only by making the inference that the provision providing a right to counsel only *before* interrogation, is meant to be corrected or negated by a subsequent provision, the catchall language that a suspect could exercise his rights "at any time . . . during this interview." This type of inference would require Intermediate prose and document literacy at the very least, since individuals with Below Basic and Basic literacy skills do not have the capacity to form inferences at all based on what they read or hear. *Literacy Behind Bars, supra* at 4, Tbl. 1-3. Even individuals possessing Intermediate Literacy skills can form only "simple" inferences and their understanding is limited to "commonplace" prose and documents. *Id.* Petitioner's suggested inference cannot easily be categorized as "simple." Moreover, social science research makes clear that the vocabulary used in *Miranda* warnings is anything but "commonplace." *See, e.g.*, Rogers, *The Language Of Miranda Warnings In American Jurisdictions: A Replication And Vocabulary Analysis*, *supra* at 130 ("[A]pproximately two-thirds (*i.e.*, 67.2%)

of the *Miranda* warnings exceeded the sentence difficulty of [the Internal Revenue Service] 1040-EZ Instructions."). Thus, Petitioner's strained interpretation of the warning is likely attainable only by those who possess Proficient prose and document literacy skills, which comprises only two to three percent of the adult prison population. *Literacy Behind Bars, supra* at 13, Fig. 2-2.

In light of the foregoing literacy data and studies analyzing individuals' true understanding of *Miranda* warnings, it is FACDL's contention that warnings must leave little to chance in their precision and simplicity if a "reasonable person in the suspect's shoes" is to understand them. In particular, warnings that rely on inference to convey their intended meaning must be avoided. *See* Daniel J. Croxall, *Inferring Uniformity: Towards Deduction and Certainty in the* Miranda *Context*, 39 McGeorge L. R. 1025, 1034 (2008) ("The only way to assure adequate warnings is to move away from allowing inference to suffice and to move towards a deductive strategy to assure full compliance with the *Miranda* directive."). The warning in this case fails to meet that standard.

B. Custodial Interrogation Produces Psychological Stress that Undermines A Suspect's Understanding of *Miranda* Warnings.

In addition to this Court's assumption in *Miranda* that warnings must be "clear and unequivocal" to be understood by a reasonable person in the suspect's shoes, another of its assumptions has been proven again and again. Indeed, the evidence to

support the "inherently compelling pressures" present in stationhouse interrogations, *Miranda*, 384 U.S. at 467, is far more prevalent now than it was in 1966. The very professional whose techniques the *Miranda* Court referenced in 1966, John E. Reid, later of John E. Reid & Associates, offers a selection of interrogation training courses across the country. The company claims that more than 500,000 professionals in the law enforcement and security fields have attended its interviewing and interrogation training programs since they were first offered in 1974. http://www.reid.com/training_programs/interview_overview.html. In a Florida Senate Criminal Justice Committee Report on electronic recording of suspect interrogations, the committee refers to Reid's book, *Criminal Interrogation and Confessions,* as "[t]he basic textbook of interrogation techniques." Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2 (Jan. 2004). The "Reid method" and others teach different approaches for interviews (which concentrate primarily on information gathering and rapport building) and interrogations, which are conducted "'in a controlled environment'" and are generally "'accusatory'" in nature. Charles D. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1521, 1531 (2008) (*quoting* FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS, 7-8 (4th ed. 2001)).

A California law enforcement training organization, Commission on Peace Officer Standards and Training ("POST"), also offers interrogation courses, one of which is entitled the "'Confrontation Interrogation Technique.'" Weisselberg, *supra*, at 1533-534 (*quoting* Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993)). The first step in the technique is "Psychological

Domination," which involves leaving the suspect alone in the interrogation room to "'heighten[] anxiety and stress'" and it goes on from there. Weisselberg, at 1534 (*quoting* CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, INTERVIEW AND INTERROGATION TECHNIQUES TELECOURSE, PARTS I & II, Apr. 8 & 22, 1993 at 20 (1994) (handbook accompanying telecourse) (available at http://libcat.post.ca.gov/dbtw-wpd/documents/POST/55607142.pdf)).

Not only are these interrogation methods available, they are widely used. Isolation, confrontation with guilt and inconsistencies, interrogating in a small room, and implying or pretending to have evidence of guilt all continue to be prevalent tactics for eliciting confessions from suspects, Weisselberg, *supra* at 1535-537, and all contribute to the "inherently compelling pressures" with which this Court was concerned over forty years ago.[9] In short, the custodial anxieties and stressors that dictated the basis for a warning requirement are alive and well and

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[9]This Court recognized in *Miranda*, "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. The Court added that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*

are even more linked to the need for clear and unequivocal warnings now than they were in 1966.[10]

Custodial stress likely carries with it another relevant side effect that gradually is becoming the focus of research and bears relevance to the instant case – namely, the effects of stress on comprehension. Because simulating interrogation carries with it ethical concerns, no published studies examine the effects of interrogation on a suspect's comprehension of *Miranda* warnings. However, Nate Gillard and Richard Rogers recently conducted a "mock-crime" study, which did just that, based on their assessment that "[t]he missing link in *Miranda* research is an evaluation of how situational stresses, often severe, affect *Miranda* comprehension and reasoning." Nate Gillard & Richard Rogers, Presentation at the

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[10]These inherently compelling pressures often have resulted in false confessions. The Innocence Project reports that, "About 25 percent of the over 240 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession." www.innocenceproject.org/Content/314.php. This is no doubt in part because "[p]olice trainers and interrogation manuals mislead detectives into believing that they can divine whether a suspect is innocent or guilty from simple non-verbal and behavioral responses to their questions." Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 986 n.38 (1997).

The Florida Senate's Committee on Criminal Justice noted in 2004 that the "Reid method," widely used in Florida, has been criticized by some, including Professor Richard Leo, as prone to producing false confessions if officers conducting Reid interrogations are not properly trained to avoid false positives. Fla. S. Comm. on Crim. Justice, Int. Rep. 2004-123, at 2-4 (Jan. 2004).

American Psychology Law Society Conference: *Situational factors: The missing link in* Miranda *knowledge*, "Summary" 1 (Mar. 2009) (Summary and Powerpoint Presentation available from Richard Rogers at rogersr@unt.edu).

Gillard and Rogers set up a mock theft scenario with a sample of seventy-nine college students who were first tested for their reading and listening comprehension, as well as their anxiety level. They were instructed to try to remove a watch from a display case without setting off an alarm attached to the case. The alarm was activated for each participant, regardless of whether or not they had handled the extraction adeptly. *Id.* at 2. Following the alarm, each participant immediately was given an oral or written administration of *Miranda* in a "cramped, windowless room." *Id.* They were "apprehended" for less than two minutes and then tested for their comprehension of the warning. *Id.* at 3. The control group underwent the same initial procedures, but participants were not "apprehended" as the mock-crime participants were. Instead, the control group participants were read warnings and were then left in a room with neutral reading materials for three minutes. *Id.* 2-3.

The results demonstrated that apprehended participants had states of anxiety that registered three times higher, on average, than the control group's. *Id.* at powerpoint slide 9. This increased anxiety directly correlated with decreased *Miranda* comprehension and reasoning: the high-anxiety apprehended group averaged a score of ten percent lower than the control group. *Id.* at powerpoint slide 10.

Thus, not only are the "inherently compelling pressures" of a stationhouse interrogation as relevant

today as they were in 1966, for the reasons they were relied on by the Court, we are now beginning to see that they may also warrant the need for increased simplicity and clarity in the administration of such warnings for different reasons. The decreased comprehension that comes with the stress of interrogation has implications for a warning of the type administered in this case. Even if one accepts Petitioner's interpretation as conceivable, it is unlikely that a suspect, faced with the decreased comprehension likely to accompany the stress of an interrogation, would be capable of reaching the inference required to disregard the warning's explicit limitation placed on the right to counsel in favor of the more expansive, contradictory catchall.[11]

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[11]Gillard and Rogers point out that due to ethical concerns, the apprehended participants were not handcuffed, nor were they isolated longer than two minutes. In addition, they were free to leave. The participants were also college educated. Nate Gillard & Richard Rogers, Presentation at the American Psychology Law Society Conference: *Situational factors: The missing link in Miranda knowledge* (Mar. 2009) (Powerpoint Presentation, slide 15, available from Richard Rogers at rogersr@unt.edu). Thus, many of the effects found presumably would be heightened in a real interrogation involving a suspect from an educational background more typical of the prison population.

C. A General Distrust of Law Enforcement and the Criminal Justice System Contributes to the Unlikelihood Respondent Would Have Inferred the Presence of a Right of Which He Was Not Informed.

Petitioner and the Solicitor General's suggestion that the "catchall" provision of the warnings here "eliminated any inference that counsel could not be present after the interview commenced, *e.g.* SG Br. at 26, defies not only the plain language of the warnings, but also disregards the real-world backgrounds of suspects in the criminal justice system.

Since this Court's ruling in *Miranda*, minority representation in the criminal justice system has increased exponentially, which many believe is due in large part to an increase in criminalization that has disproportionately affected minorities. *See, e.g.*, Fay Taxman et al., *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring the Consequences for Deterrence*, 16 J. of Health Care for the Poor & Undeserved 57, 63 (2005). The incarceration rate for blacks born in 1971 is one in eight, for Hispanics it is one in twenty-five, and for non-Hispanic, white males it is one in fifty. Estimates for those born in 1991 project that the rate for black males will jump to one in three, for Hispanic males to one in six, and for non-Hispanic males to one in seventeen. Thus, while the percentage of incarcerated black males is expected to jump from 12.5 percent to over 33 percent in twenty years, the percentage of white males incarcerated only will have jumped from 2 percent to under 6 percent. *Id.* at 63. In short,

"[m]inorities are gravely over-represented in every stage of the criminal process[.]" Erik Luna, *Race, Crime and Institutional Design*, 66 L. & Contemp. Probs. 183 (2003) (citations omitted).

Along with these statistics has come an undeniable distrust in the criminal justice system by members of racial and ethnic minority communities. This is yet another factor that Petitioner and the Solicitor General ignore in their strained interpretation of the warning here. This distrust may stem from the belief that law enforcement agencies engage in racial profiling, that particular officers are racist, that the war on drugs is applied disproportionately to drugs that affect the African American community, that immigrant communities are targeted by law enforcement because of increased enforcement of immigration regulations, or from some combination of these factors and others.

Law professor Erik Luna points out that by contrast, one can attach any number of "positive hypotheses" to the overrepresentation of blacks in the criminal justice system, such as the influence of poverty on criminal prevalence, the intensity of policing in open-air drug markets in black neighborhoods, [or] the simple fact that perhaps blacks commit more crimes than whites[.]" Luna, *Race, Crime and Institutional Design*, *supra* at 183-84. He concludes, however, that regardless of these possible hypotheses, "the statistics lead to one dominant view within the black community: African Americans are overrepresented in the system because of racial prejudice by law enforcement." *Id.*

A recent Pew Hispanic Center Study found that only thirty-seven percent of blacks and forty-six

percent of Hispanics believe the police will treat them fairly, compared with nearly three quarters of whites. Mark Hugo Lopez & Gretchen Livingston, *Pew Hispanic Center, Hispanics and the Criminal Justice System: Low Confidence, High Exposure* 1 (Apr. 7, 2009). Similarly, a 2001 study conducted by the Bureau of Justice Statistics found that sixty-three percent of whites surveyed expressed confidence in law enforcement officers compared with only thirty-eight percent of blacks. Bureau of Justice Statistics, *Sourcebook Criminal Justice Statistics Online*, Table 2.12.2009 (2009), available at http://www.albany.edu/sourcebook/pdf/t21222009.pdf. As Fay Taxman and her co-authors put it, "The front end of the criminal justice system is plagued with citizen concerns about the legitimacy of the police and other agents of the criminal justice system[.]" Taxman, *supra* at 69.

Whether or not the most damning perceptions about law enforcement are in fact true, either in whole or in part, is not relevant to the inquiry before the Court. What *is* relevant, however, is the reality that such perceptions exist. A reasonable person in the suspect's shoes is increasingly minority and increasingly distrustful of law enforcement. The likely consequence is that if he is read a *Miranda* warning advising him he has the right to a lawyer *before* questioning, he simply is not likely to infer he is entitled to more. To be sure, someone inclined to distrust police altogether may throw the baby out with the bath water and disregard all warnings, believing them to be a mere formality that officers have no intention of honoring. However, for one who actually decides to test the waters, a clear warning that does not require inferences or other language to "eliminate"

its lack of clarity may make the difference between invocation and waiver.

In conclusion, the Tampa Police Department's warning misled suspects concerning a key constitutional right – the right to counsel during interrogation. The only possible mechanism for reading that right into the warning would be to make a sophisticated inference requiring a literacy level that eludes the vast majority of the public, much less those who come into contact with the criminal justice system. When the stresses of interrogation are factored into the equation, it is pure fallacy to argue that the majority of suspects would make it. Finally, allowing warnings like the one here to suffice overlooks that those most likely to receive warnings may be those who need clarity the most because of their low levels of confidence in law enforcement.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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OCTOBER 2009

AMICUS CURIAE BRIEF

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(7)

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

No. 08-1175

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC. AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Florida Public Defender Association, Inc., is a state-wide organization of Florida's elected public defenders, and other public defender staff, who are charged by Florida's constitution and general laws with representing indigent criminal defendants, including the counseling of recent arrestees.

The Association has an interest in this case because it directly involves the advice that the police must give before custodial interrogation of suspects, many of them unable to afford counsel, regarding access to appointed counsel, including public defenders.

SUMMARY OF ARGUMENT

The decision below rests on adequate state law grounds independent of *Miranda*.

Florida has an exclusionary rule regarding custodial statements dating back to an 1853 case ruling inadmissible the confessions of Simon, a slave, in part because there had been no "[e]xplicit warning of the accused by the magistrate." By 1909 the state supreme court wrote that the state may not use a custodial statement to a magistrate unless the suspect was advised of his rights, and in 1992 it held in *Traylor v. State* that this rule applied to all custodial statements, writing that article I, section 9 of the state constitution has safeguards "similar to," but broader than, those set

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of this Court.

out in *Miranda*.

At bar, the state supreme court relied on *Traylor* and its state constitutional law basis in holding Powell's statement inadmissible because the police did not adequately advise him of his right to the presence of a lawyer during his interrogation.

Florida has significant reasons for having its own broad safeguards regarding custodial interrogations, and its state law exclusionary rule provides an adequate and independent state law ground for the decision at bar.

Regardless whether Powell's statement was admissible under *Miranda*, it was inadmissible under the broader safeguards of Florida's exclusionary rule as set out in *Traylor*. The petitioner seeks a paradoxical ruling from the Court: that the states must be uniformly unable to devise their own uniform rules as to the manner that suspects are advised of their rights before questioning. However sensible such a result might be in the abstract, it cannot affect Florida's sovereign right to require, as a matter of state law, that the police advise suspects with unmistakable clarity as to their right to have counsel present during custodial interrogation.

ARGUMENT

THE STATE SUPREME COURT RESTED ITS DECISION INDEPENDENTLY ON A STATE LAW EXCLUSIONARY RULE THAT DATES BACK TO BEFORE *MIRANDA* AND BEFORE THE RATIFICATION OF THE FOURTEENTH AMENDMENT ITSELF.

The Court has before it for review *State v. Powell*, 998 So. 2d 531 (2008), which stated that "[b]oth *Miranda*[2] and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning," and determined that Powell was not adequately informed of his right to have counsel present during his custodial interrogation. *Id.* at 542.

With regard to article I, section 9,[3] the court relied on *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992), a state constitutional law decision writing: "Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to [a] lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation." *State v. Powell*, 998 So. 2d at 540.

This reliance on the separate ground of article I, section 9 of the state constitution under *Traylor* was not a passing reference to undeveloped state law, but a conclusion resulting from a rich history of state consti-

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] "No person shall ... be compelled in any criminal matter to be a witness against oneself."

tutional law litigation regarding the Declaration of Rights in the Florida Constitution. In particular, it reflects Florida's long-standing state law exclusionary rule arising under article I, section 9.

I. Florida's Declaration of Rights.

Quoting *State ex rel. Davis v. City of Stuart*, 120 So. 335, 347 (Fla.1929), *Traylor* said of Florida's Declaration of Rights: "No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this 'stalwart set of basic principles.'" *Traylor*, 596 So. 2d at 963. This statement shows the court's commitment to a broad reading of individual rights under the state constitution.

Florida's first constitution was drafted in 1838, and contained the Declaration of Rights as article I. Among other things, it provided for trial by jury (section 6), protection against unreasonable searches (section 7), due process (section 8), the rights to counsel, notice of the nature and cause of an accusation, confrontation of witnesses, compulsory process, and a speedy and public trial by an impartial jury, and the right not to be compelled to give evidence against oneself (section 10). The Declaration of Rights has been in every subsequent Florida constitution, including the present one, which was adopted in 1968.[4]

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[4] The enumeration of the rights has changed over the years. The right against self-incrimination was in section 8 of the Declaration of Rights of the 1868 Constitution, and it was in section 12 of the Declaration in the 1885 Constitution. It is now in article I, section 9 of the 1968 Constitution.

Florida has a long history of enforcing the rights of criminal defendants before analogous rights were applied to the states by the Fourteenth Amendment as construed by this Court. In fact, such state law rights were enforced well before ratification of the Fourteenth Amendment itself.

Holten v. State, 2 Fla. 476 (1849), found a violation of the state constitutional rights to a public jury trial, to be heard by counsel, and to be present at all material stages of the trial when the judge sent written instructions to the jury out of the presence of the accused and his counsel. In *Simon v. State*, 5 Fla. 285 (1853), the court held that involuntary and unwarned statements of the accused could not be used against him. *Groner v. State*, 6 Fla. 39 (1855) established that a charging document must allege all facts necessary for conviction. The court wrote that the reasonable doubt standard applies to criminal prosecutions in *Joe v. State*, 6 Fla. 591 (Fla.1856), and wrote that the jury must "give the defendant the benefit of every reasonable doubt" in *Atzroth v. State*, 10 Fla. 207 (Fla.1860). The court recognized the right to a unanimous verdict in *Motion to Call Circuit Judge to Bench*, 8 Fla. 459 (1859). The requirement that the jury be accurately instructed on the elements of the offense was established in *Cato v. State*, 9 Fla. 163 (1860).

In addition to these antebellum cases, which of course preceded the Fourteenth Amendment, subsequent cases laid out the basic principles governing criminal trials under the state constitution well before similar rights were applied to the states under the theory of incorporation.

Long before *Benton v. Maryland*, 395 U.S. 784 (1969), the court held in *Potter v. State*, 109 So. 91, 92

(Fla.1926) that "under the Constitution and laws of this state, when a person has once been indicted for an offense, tried and acquitted, he cannot afterwards lawfully be indicted a second time for the same offense." *See also Johnson v. State*, 9 So. 208 (Fla.1891) (where defendant was charged with first degree murder and convicted of second degree murder, and second degree murder conviction was overturned on appeal, he could not be retried for first degree murder under Double Jeopardy Clause of Declaration of Rights).

Before *Faretta v. California*, 422 U.S. 806 (1975), the court determined in *State v. Capetta*, 216 So. 2d 749 (Fla.1968), that the Declaration of Rights confers on a criminal defendant the right to self-representation.

Long before *Washington v. Texas*, 388 U.S. 14 (1967), the court ruled that the accused has the state constitutional right to compulsory process of witnesses without prepayment of costs in *Buckman v. Alexander*, 3 So. 817, 818 (Fla.1888). *See also Pittman v. State*, 41 So. 385, 388-89 (Fla.1906) (noting that right arises from state constitution and not from federal constitution).

The court ruled that evidence obtained in an illegal search must be suppressed in *Gildrie v. State*, 113 So. 704 (1927) and *Hart v. State*, 103 So. 633 (1925), well before *Mapp v. Ohio*, 367 U.S. 643 (1961).

These pre-incorporation cases may contain extensive discussions of foreign case law, including federal case law,[5] but they all inarguably rest on state law. In-

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[5] *Potter* cited *Ball v. United States*, 163 U.S. 662 (1896); *Johnson* cited numerous cases from other states. *State v. Capetta* cited federal circuit court of appeal cases. *Pittman* cited numerous decisions of other state courts. *Gildrie* cited the Fourth and Fifth

corporation has not washed away the state court's continuing power to give the Declaration of Rights a broader reading than the federal constitution.

In fact, the state court continues to read the state constitution as conferring broader rights than the federal constitution. Thus, the court wrote in *State v. Kelly*, 999 So. 2d 1029, 1041 (Fla.2008): "Florida provides a broader right to counsel under article I, section 16 of our state Constitution than that provided by the federal courts under the Sixth Amendment." *See also In re T.W.*, 551 So. 2d 1186 (Fla.1989) (right to privacy under Declaration of Rights "is much broader in scope than that of the Federal Constitution"); *Allen v. State*, 636 So. 2d 494 (Fla.1994) (imposition of death penalty on defendant under the age of 16 at time of crime violates article I, section 17 of Florida Constitution); *Brennan v. State*, 754 So. 2d 1 (Fla.1999) (imposition of death penalty on defendant under the age of 17 violates article I, section 17); *Griffis v. State*, 759 So. 2d 668, 672 (Fla.2000) ("the Florida Constitution, unlike its federal counterpart, contains an express right of appeal").

II. The exclusionary rule of article 1, section 9 of the Florida Constitution.

Amendments and contained an extended quotation from, and discussion of, *Agnello v. United States*, 269 U.S. 20 (1925), and held that evidence found in an illegal search had to be excluded because "to admit it is not only to violate the Fifth Amendment of the federal Constitution, but also violates section 12 of the Bill of Rights of the Constitution of Florida. *See, also, Hart v. State*, 89 Fla. 202, 103 So. 633." 113 So. 2d at 142. *Hart* also cited decisions of this Court and of other states in reaching its state law decision.

In keeping with the foregoing, the supreme court has read the state constitutional right against self-incrimination broadly. A state law exclusionary rule developed for more than a century leading up to the decision in *Traylor*. In relying on *Traylor* below, the state supreme court rested its decision on this separate body of state law in finding Powell's statement inadmissible.

A. The development of Florida's exclusionary rule before *Traylor*.

As already noted, the state supreme court prohibited the use of involuntary confessions in its 1853 decision in *Simon*. In that case, the court established the beginnings of Florida's rules about advising suspects as to the right to remain silent.

A slave, Simon was arrested on suspicion of arson and brought before the mayor of Pensacola. A large and excited crowd called for hanging him. The mayor prevented a lynching, but told Simon that he would be tried and hanged, and advised him that he could turn state's evidence by identifying his accomplices. The mayor later repeated these statements and Simon confessed. The next morning, he confessed again and accused an accomplice, but later was unable to identify the man. Simon was then convicted and sentenced to be hanged.

The supreme court held that the first confession was inadmissible because it arose from a fear of personal violence. It further held that the second confession was to be suppressed on the same ground, especially as there had been no "[e]xplicit warning of the accused by the magistrate."

Similarly, in *Coffee v. State*, 6 So. 493 (Fla.1889), Coffee was induced to confess under threat of being hanged. He later confessed to justices of the peace without being warned of his rights. The supreme court held all of these confessions inadmissible and noted that, before taking a confession, it is "the duty of the justice of the peace holding the same to caution the prisoner, to put him on his guard, and to inform him as to his rights in the premises." *Id.* at 496.

In *Green v. State*, 24 So. 537, 538 (Fla.1898), the court held that, under *Simon*, confessions should be acted upon by courts and juries with great caution, and that, under *Coffee*, when an arrestee "is brought before a justice of the peace or other officer for preliminary examination, it is the duty of the officer to caution the accused that any statement or confession he may make may be used against him, and to inform him of his rights in the premises." The court further cited to English cases holding admissible confessions to arresting officers who had first advised the arrestees of the right against self-incrimination. *Id.*

In *Ex parte Senior*, 19 So. 652 (Fla.1896), the court wrote that the state constitutional right against self-incrimination "should be broadly and liberally construed." *Id.* at 654.

In *Daniels v. State*, 48 So. 747, 748 (Fla.1909), which involved a judicial confession, the court set out the state-law exclusionary rule that "testimony as to confessions of guilt made to officers or when under arrest is not admissible in evidence at the trial, unless it is clearly shown that the confession was voluntarily made after the party is fully advised of his rights under the law."

Thus, through the early Twentieth Century, Flor-

ida had a growing body of case law requiring that the suspect be advised of the right against self-incrimination. Again, these cases cited and discussed federal law and the law of other states,[6] but they are based on Florida law.

B. Florida's exclusionary rule under *Traylor*.

The foregoing body of case law led to *Traylor*, the main state law decision relied on by state supreme court in the case now before this Court.

The court said in *Traylor* that *Miranda* "established procedural safeguards similar to" those required by the state constitution, 596 So. 2d at 965, n.12, and made clear that Florida's safeguards arise from the Declaration of Rights.

With respect to the privilege against self-incrimination of article I, section 9, the court traced the history of Florida's exclusionary rule arising from *Simon*, and extended by the rule of *Coffee* and *Green* regarding the requirement that prisoners be informed of their rights before being questioned by an officer at a preliminary hearing. *Id.* at 964-65. It further noted that, under *Daniels*, '[c]onfessions obtained in violation of these rules were inadmissible at trial." *Traylor*, 596 So. 2d at 964.

The court then held that the state constitution requires that a suspect be advised of the right to a lawyer's help, including the right to have the lawyer present during interrogation:

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[6] *Simon* cited to a New Jersey case, *Coffee* cited numerous out-of-state decisions, and *Ex parte Senior* cited *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and many decisions from other states.

> Based on the foregoing analysis of our Florida law and the experience under *Miranda* and its progeny,[FN12] we hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help,[FN13] and that if they cannot pay for a lawyer one will be appointed to help them.
>
> [FN12] In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the federal Court established procedural safeguards similar to those defined above in order to ensure the voluntariness of statements rendered during custodial interrogation. In subsequent decisions, the Court expanded *Miranda's* scope. [Citations omitted].
>
> In other areas, the Court limited *Miranda's* scope. [Citations omitted.]
>
> [FN13] This means that the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation.

Id. at 965-66. Thus, *Traylor* made clear that separate state law rules govern custodial interrogation, includ-

ing that the suspect must be informed of the right to the presence of counsel during interrogation. The court so ruled because of its view that *Miranda* is subject to modification by this Court, and also because of the long line of state law cases arising from *Simon*.

Traylor also established another state law requirement as to the waiver of rights. It wrote that "where reasonably practical, prudence suggests it should be in writing," saying that this rule remedied "a major criticism of *Miranda*," namely that, as *Miranda* does not require a written waiver of rights, it creates the risk of a swearing contest between the police and the defendant. *Id.* at 966.

The court wrote that these rules serve a state law goal and are required by the state constitution: "A prime purpose of the above safeguards is to maintain a bright-line standard for police interrogation; any statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the State." *Id.* at 966.

Thus, *Traylor* set out rules that: (1) arise from more than a century of state law; (2) are "similar to," but broader than, the requirements of the Fourteenth Amendment as interpreted in *Miranda*; and (3) establish a bright-line standard for police interrogation in Florida under the state constitution.

The state supreme court has continued to build on the state law foundation of *Traylor*.

In *Thompson v. State*, 595 So. 2d 16, 18 (Fla.1992), the court wrote:

> As we said in *Traylor*, to insure that confessions are freely given, article I, section 9 of the Florida Constitution, requires that, prior to

> questioning, the indigent accused be advised of and given the opportunity to consult with a court-appointed lawyer. The record is clear that Thompson did not understand this right, and it is mere speculation whether he would have waived it had he understood.

In *Allred v. State*, 622 So. 2d 984 (Fla.1993), the court found a violation of the state constitutional right to silence under *Traylor* and article I, section 9, when an officer had a suspected drunk driver recite the alphabet from "c to w." The lower court had found a federal constitutional violation under *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), but the supreme court based its ruling solely on state law grounds.

Peoples v. State, 612 So. 2d 555, 556 (Fla.1992) held that, under *Traylor*, the state constitutional right to counsel attaches "as soon as feasible after custodial restraint."

In *State v. Guess*, 613 So. 2d 406 (Fla.1992), an officer testified to a statement made by Guess. Guess sought to testify out of the jury's presence that his statement was not voluntary. The trial court refused his request, and ruled his statement voluntary without hearing his testimony. The state argued that the harmless error standard of *Arizona v. Fulminante*, 499 U.S. 279 (1991) applied to the judge's erroneous voluntariness determination, but the state supreme court ruled that the federal standard did not apply, and held that reversal was required as a matter of state law under article I, section 9 and *Traylor*.

In *State v. Owen*, 696 So. 2d 715 (Fla.1997), the court receded from its 1990 decision holding Owen's confession inadmissible because he had made an am-

biguous invocation of the right to remain silent during his interrogation, and held Owen's statement was admissible under the reasoning of *Davis v. United States*, 512 U.S. 452 (1994). In this regard, the court wrote that *Traylor* "added nothing to federal law" with regard to the suspect's right to terminate interrogation by "indicat[ing] in any manner" a desire to remain silent. *Id.* at 719. It reiterated the state law basis of *Traylor*, but said that it found *Davis* "persuasive" on the issue before it: "[*Traylor*] does, however, remind us that we have the authority to reaffirm *Owen* regardless of federal law. Upon consideration, we choose not to do so. We find the reasoning of *Davis* persuasive". *Id.*

State v. Owen thus aligned Florida law with "persuasive" federal law on the discrete issue of the duties of law enforcement "when a suspect makes an equivocal statement regarding the right to remain silent." *Id.* at 720. *Compare Ramirez v. State*, 739 So. 2d 568, 573 (Fla.1999)[7] (noting in text and footnote 3 that *State v. Owen's* analysis of this issue under *Traylor* is identical with federal law) *with Almeida v. State*, 737 So. 2d 520, 524-26 (Fla.1999) (limiting *State v. Owen* to its facts and repeating that *Traylor's* exclusionary rule derives from *Simon* and the Florida Constitution).

Almeida held: "Article I, section 9, Florida Constitution, requires that whenever a suspect's rights are clearly raised in the interrogation room-whether by police or the suspect-officers must pursue the matter in an open and forthright manner." *Almeida*, 737 So. 2d at 526. The court noted that *Traylor* was based on

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[7] *Ramirez* held that Florida law does not differ from federal law on the question of whether a suspect is in custody.

state law arising from *Simon* and article I, section 9, and wrote that *Traylor* established "guidelines for use in Florida - similar to those announced in *Miranda* - that were designed to ensure the voluntariness of confessions." *Id*, 737 So. 2d at 524-25.

In *State v. Hoggins*, 718 So. 2d 761 (Fla.1998), the court concluded that, even though this Court had found that the prosecution may impeach defendants with their pre-*Miranda* silence, such impeachment violates the state constitutional right to silence under *Traylor*. *See also Cowan v. State*, 3 So. 3d 446, 449-50 (Fla. 4th DCA 2009) (following *State v. Hoggins*).

Although *Traylor*, *Thompson*, *Allred*, and *Almeida*, like the case at bar, contain numerous references to *Miranda* and other federal case law, they rest on state law grounds under the Declaration of Rights.

Thus, in *State v. Kelly*, the court stressed the state law nature of *Traylor*, writing that, under *Traylor*, the state courts should look to their own state law traditions in construing the state constitution:

> This Court clearly stated in *Traylor v. State*, 596 So. 2d 957, 962 (Fla.1992):
>
> > [W]hen called upon to construe their bills of rights, state courts should focus primarily on *factors that inhere in their own unique state experience*, such as the express language of the constitutional provision, its formative history, both *preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history*, and finally any external influences that may have shaped

state law.

State v. Kelly, 999 So. 2d at 1041 (quoting and adding emphasis to *Traylor*).

C. Florida's exclusionary rule and the decision below.

We see from the foregoing that Florida has a long history of safeguarding against involuntary confessions and the uninformed waiver of the right to remain silent. "[I]n this context, the federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart." *Rigterink v. State*, 2 So. 3d 221, 241 (Fla.2009), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229) (failure to advise of right to presence of counsel during questioning violated state constitutional right to remain silent).

At bar, the court initially framed the issue before it as one involving *Miranda* because that was how the issue was presented to it. *State v. Powell*, 998 So. 2d at 533-34. After discussing *Miranda*, it turned to the state law rule of *Traylor*, saying it serves "to ensure the voluntariness of confessions as required by article I, section 9 of the Florida Constitution." *Id.* at 534-35. It then looked to federal cases and found them "split." *Id.* at 536-37. It reviewed Florida cases and found that the majority of reviewing courts had found inadequate warnings similar to those at bar. *Id.* at 537-40. It then examined the warnings given to Powell, and noted again that the state argued that they complied with

Miranda. *Id.* at 540.

After discussing the state's *Miranda* argument, the court ruled that the warnings did not comply with the requirements of article I, section 9 and *Traylor*:

> Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*, a defendant has a right to lawyer's help, that is, the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. *Accord Ramirez*, 739 So. 2d at 573 (finding suspects must be informed that they have a right to an attorney during questioning); *Sapp*, 690 So. 2d at 583-84 (same). The standard police department *Miranda* form used during the interrogation of Powell did not expressly indicate that he had the right to have an attorney present during questioning. Powell was told he had the right to talk with a lawyer before questioning and that he could use that right at any time during the interview. The right he could use during the interview was the right he was told he had-to talk with a lawyer before answering questions. This is not the functional equivalent of having the lawyer present with you during questioning. As stated in *Miranda*, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning.

Miranda, 384 U.S. at 469-70, 86 S.Ct. 1602.

Id. at 540-41. The discussion of *Miranda* at the end of the foregoing paragraph was secondary to the holding based on article I, section 9 and *Traylor*.

The court then continued to address the state's arguments based on *Miranda*. *Id.* Again, this discussion does not affect the court's state law ruling. Finally, it summarized its agreement with the lower court that the *Miranda* warning card was inadequate because it did not comply with the separate requirements of *Miranda* and article I, section 9:

> Because Powell was not clearly informed of his right to the presence of counsel during the custodial interrogation, we agree with the Second District and answer the certified question in the affirmative. Thus, we also agree with the Second District that to advise a suspect that he has the right to talk to a lawyer before answering any of our questions constitutes a narrower and less functional warning than that required by *Miranda*. Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning. Based on this conclusion, we approve the Second District's decision in *Powell* to the extent the decision is consistent with this opinion.

Id. at 542.

In relying on *Traylor* and article I, section 9, the court relied on a solid, long-standing body of state law

growing from *Simon* through *Traylor* as set out above. It would certainly have been simpler for the court to have dispensed with the federal law argument as summarily as it did in *State v. Guess*. Nevertheless, the extensive discussion of *Miranda* is consistent with the court's long-standing practice of consulting foreign law, including federal law, when confronting an issue of state constitutional law and then deciding whether to align state law with such authorities as it finds persuasive.[8]

III. The Florida court has significant reasons for stricter state law rules governing the warnings given to suspects in custody.

As already noted, *Traylor* established bright line rules regarding Florida custodial interrogations based on the principle that the state court should base its decisions on factors inhering in Florida's unique experience, as well as preexisting and developing state law, evolving customs, traditions and attitudes within the state, Florida's general history, and any external influences that may have shaped state law. *State v. Kelly*, 999 So. 2d at 1041 (quoting *Traylor*). We can see several such reasons for Florida's state law rule at bar.

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[8] Needless to say, Florida courts also often consider case law from other jurisdictions in deciding state law issues of less than constitutional magnitude. Sometimes it finds such cases persuasive, sometimes it does not. *Compare Martinez v. State*, 761 So. 2d 1074, 1086-87 (Fla.2000) (following federal case law as to instructions to jurors given transcripts while listening to recordings) *with State v. Pennington*, 534 So. 2d 393, 394-95 (Fla.1988) (considering at length, but declining to follow, federal case as to preservation of issue for appeal).

A. False confessions.

The state supreme court has long been concerned about the conviction of the innocent based on false confessions: "it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes, for which they suffered the most horrible punishments, and yet they were innocent." *Coffee*, 6 So. 493 at 511.

This concern has become more acute as DNA testing has shown that persons have been convicted of "the most heinous crimes" in Florida on the basis of false confessions. *See* Warren Richey, *DNA Evidence Clear Florida Inmate after 23 Years*, Christian Science Monitor (Sep. 10, 2009) (DNA testing showed innocence of man convicted of rape and murder based on false confession); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. Marshall J. Computer & Info. L. 771, 774 (Summer 2005) ("In late 2003, Broward County, Florida, police agencies buckled under public pressure and voluntarily adopted a video recording requirement after a local newspaper uncovered an astonishing thirty-eight false confession cases.").

Florida is among the states with the highest number of false confessions leading to convictions. *See* Steven A. Drizin, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945-46 (Mar. 2004). Former Justice Cantero recently wrote that an "alarming problem with Florida's death penalty is the number of defendants on Death Row who were later exonerated." Raoul G. Cantero III and Mark R. Schlakman, *Let's Talk death penalty in 2010*, Tallahassee Democrat (Sep. 16, 2009).

One way to protect against false confessions is to insist that suspects be advised of their rights with unmistakable clarity.

B. The costs of litigation of variant forms.

Florida has a strong interest in avoiding expensive and time-consuming litigation of the question of whether the suspect was aware of, and knowingly waived, the right to the presence of counsel during interrogation.

As already noted, *Traylor* sought to remedy with its state law rules a perceived problem with *Miranda*, namely that *Miranda* allows officers to warn suspects of their rights orally, which leads to swearing contests between officers and defendants. The ruling at bar would reduce the cost of litigating the question of whether the suspect was aware of, and knowingly waived, the right to the presence of counsel during interrogation.

Florida faces an acute financial crisis, including massive decreases in funding for court personnel. The Florida Bar News recently reported that the state's clerks of court have had to lay off almost twenty percent of their court staff and furloughed many others. *Court clerks bemoan their lack of resources*, Fla. Bar News, Oct. 1, 2009 at 1. Adherence to the bright line standards of *Traylor* and the decision below will lead to simplifying and reducing the time-consuming litigation of motions to suppress.

C. Suspects' varied comprehension levels.

Florida is particularly vigorous in the prosecution

of juveniles,[9] and it deals with large numbers of the mentally ill and mentally retarded in its criminal justice system.[10] Further, it has a large population of persons from countries with legal systems with little or no regard for the rights of criminal suspects.

Florida can have no interest in making officers try to gauge the level at which individual suspects understand the right to remain silent. The state can avoid problems that arise from varying levels of comprehension by the use of forms that spell out the suspect's rights with clarity. Regardless whether an adult citizen of average intelligence and normal mental health may readily grasp that the right includes the right to have an attorney present during questioning, the universe of suspects includes children, the mentally ill, immigrants, and ill-educated persons who may not be so discerning.[11] The Florida constitution protects these

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[9] *See* Fla. Dept. of Juv. Justice, Bureau of Data and Research, *A DJJ Success Story: Trends in Transfer Of Juveniles to Adult Criminal Court* 5 (Jan. 8, 2002) ("The Bureau of Justice Statistics reported that Florida held more juveniles in prison in the year 2000 than any other state").

[10] Susan L. Clayton, *Judge Steven Leifman Advocates for the Mentally Ill*, Corrections Today (April 1, 2009) ("'When I became a judge I had no idea that I was becoming a gatekeeper to the largest psychiatric facility in the state of Florida--the Miami-Dade Jail,' said Miami-Dade County Judge Steven Leifman, keynote speaker at the H-PIS Special Session and Luncheon." Leifman said that "Florida needs 10 new prisons over the next five to six years just to house people with mental illnesses.").

[11] *Cf. T.S.D. v. State*, 741 So. 2d 1142 (Fla. 3rd DCA 1999) (interrogation of 12 year old with history of psychological problems, IQ of 62, and third grade reading level); *J.G. v. State*, 883 So. 2d 915 (Fla. 1st DCA 2004) (interrogation of 13 year old who was enrolled in courses for emotionally handicapped students, and had history of academic failure); *W.M. v. State*, 585 So. 2d 979 (Fla. 4th

people as well as the average person.

D. Simplification of jury determinations of voluntariness.

Florida's prosecutors are burdened not only with proving to the court's satisfaction that a confession is voluntary, they must also persuade the jury. Florida Standard Criminal Jury Instruction 3.9(e) (formerly 2.04(e)), tells jurors that they "must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made," and that "[i]f you conclude the defendant's out-of-court statement was not freely and voluntarily made, you should disregard it." *See Jimenez v. State*, 928 So. 2d 508, 510, n.2 (Fla. 3rd DCA 2006). The jury will have an easier job with this determination if it is presented with a written waiver setting out each of the defendant's rights with unmistakable clarity.

* * *

This Court will normally "avoid imposing a single solution on the States from the top down". *See, Smith v. Robbins*, 528 U.S. 259, 275-76 (2000). The states have wide discretion to "experiment with solutions to difficult problems of policy," *id.* at 273, and they have the sovereign right to fashion their own laws in conformity with their own legal history to address the unique problems that each of them faces.

DCA 1991) (interrogation of 10 year old Haitian boy with IQ of 69 or 70); *Thompson* (interrogation of borderline retarded suspect).

At bar, the petitioner asks the Court to impose on the states a rule that they may not develop their own individual rules regarding the advice given to suspects by state law enforcement officials. Regardless whether such an argument is sensible in the abstract, it cannot lead to a result that will deprive Florida of its power to construe its own Declaration of Rights in the manner that it has done at bar.

Regardless whether the warnings here satisfy *Miranda*, that would not alter the state court's holding that the warnings were insufficient under article I, section 9, and that the statement was inadmissible as a matter of state law, given the vitality of Florida's exclusionary rule and the considerations that support it. If the Court reverses the decision below, the outcome for Powell will be the same since the state supreme court based its decision on an adequate and independent state law ground.

CONCLUSION

The Court should not reverse the decision of the state supreme court.

Respectfully submitted,

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OCTOBER 2009

AMICUS CURIAE BRIEF

No. 08-1175

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

KEVIN DEWAYNE POWELL,

Respondent.

On Writ of Certiorari to the Florida Supreme Court

BRIEF FOR PROFESSOR RICHARD A. LEO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, under *Miranda v. Arizona*, 384 U.S. 436 (1966), a suspect is adequately informed of his right to the presence of counsel *during* custodial interrogation when advised only of his "right to talk to a lawyer *before* answering any of our questions."

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INTEREST OF *AMICUS CURIAE*

Professor Richard A. Leo submits this *amicus curiae* brief in support of Respondent Kevin Dewayne Powell.[1] Professor Leo is an Associate Professor of Law at the University of San Francisco and has authored numerous works concerning *Miranda v. Arizona*, 384 U.S. 436 (1966). The focus of his work has been to determine, based on empirical research, how law enforcement officers and agencies have altered their questioning of suspects through custodial interrogations in response to *Miranda*. His book, *Police Interrogation and American Justice* (2008), is based on materials gathered from numerous police interrogation training seminars; a review of interrogation training manuals published since 1940; numerous in-depth interviews with interrogators and suspects over the course of a decade; and analyses of the police reports, trial transcripts and interrogation tapes from more than 2,000 felony cases involving confessions.[2] The book draws upon years of research,

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[1] No counsel for a party authored any part of this brief. No person or entity other than Professor Leo and his counsel made any monetary contribution towards the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

[2] Professor Leo's research into the ways in which *Miranda* operates in practice has received numerous accolades. *See, e.g.*, Mark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 Ohio St. J. Crim. L. 711 (2009) ("ground-breaking empirical research"); Ephraim Margolin, Book Review, *Police Interrogation and American Justice*, 32 Champion 57 (2008) ("the best book on this subject;" "both convincing and brilliant"); Heidi Boghosian, Book Review, *Police Interrogation and American Justice*, 55 Fed. Law. 47 (2008) ("Leo's book is a powerful

including Professor Leo's previous extensive study of police interrogation practices in California. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621 (1996) ["Miranda *Revisited*"] (based on "almost 200 police interrogations . . . observed in more than nine months of participant observation fieldwork inside the criminal investigation divisions of three police departments" in California).[3]

Given his expertise, Professor Leo has been invited to train police interrogators in numerous states, and he has served on advisory committees to police departments. "It is fair to say that there are few, if any, scholars who have witnessed the interrogation battlefield from the trenches, as Leo." Godsey, *supra*, at 712; *accord* Yale Kamisar, *Symposium: On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It - And What Happened to It*, 5 Ohio St. J. Crim. L. 163, 193 (2007) (Professor Leo "probably knows more about the dynamics of police interrogation than anyone else in academia.").

Professor Leo is submitting this brief because the Solicitor General surprisingly has filed a brief in support of Florida that not only takes a position that

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contribution to criminal justice public policy."); Christopher Slobogin, *Confessions and Police Disclosure*, 39 Tex. Tech L. Rev. 1275, 1282 (2007) ("the most comprehensive research on interrogations in the United States"); George C. Thomas III, *Stories About* Miranda, 102 Mich. L. Rev. 1959, 1965 (2004) ("pioneering").

[3] The results of Professor Leo's study on police interrogation are in line with a recent study by George C. Thomas III. *Stories About* Miranda, 102 Mich. L. Rev. 1959 (2004).

would invite law enforcement agencies to reduce the clarity of the *Miranda* warnings currently used in most jurisdictions, but has done so based on assumptions that are not supported by empirical research and the reality of police interrogation policies and practices in America. *See* Brief of Solicitor General, *Florida v. Powell* (No. 08-1175) (2009) ["SG Br."]. Professor Leo believes that an accurate understanding of how *Miranda* is implemented in practice will assist the Court in appreciating the potential real world consequences of its decision in this case.

SUMMARY OF ARGUMENT

Professor Leo's research demonstrates that the same need to control "overzealous police practices" that led this Court to require law enforcement to give persons subject to custodial interrogation *Miranda* warnings continues to exist today. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Court adopted the *Miranda* rule to address those circumstances where law enforcement officers were coercing confessions, even though the Court acknowledged such practices were an "exception" to the way law enforcement normally operated. *Id.* at 447. While the vast majority of law enforcement today has adapted to *Miranda*, there remain overzealous law enforcement officers and agencies that seek to circumvent the protections afforded in *Miranda*. Indeed, the warnings given by the Tampa Police Department in this case suggest a desire to do just that.

The reason that law enforcement has adapted to *Miranda* – and that some law enforcement agencies, like the Tampa Police Department, remain outliers –

is that *Miranda*'s dictates are clear and this Court has vigorously enforced the *Miranda* rule. To be sure, *Miranda* has its detractors in law enforcement who have sought to circumvent the decision through a myriad of ways and, to some extent, they have succeeded in undermining *Miranda*. But the clarity of *Miranda*'s warnings and the certainty that this Court will enforce *Miranda* has led to the current regime where language touching upon all the required warnings is conveyed in almost all cases.

If the Court were to weaken the *Miranda* warnings or substitute gray areas for the clarity that *Miranda* now provides, the walls that protect *Miranda*'s core would crumble. Law enforcement agencies cannot be expected to afford the accused more rights than they have to, so a downward revision in *Miranda*'s requirements should be expected to result in a downward revision in the near uniform *Miranda* warnings that are now given. And those who seek to skirt *Miranda* can be expected to test whether the Court would allow other well-settled aspects of the *Miranda* warnings to fall to the wayside as well. Given that the law is now clear and that law enforcement has adapted to *Miranda*, *see* Brief of Respondent, *Florida v. Powell* (No. 08-1175)(2009) ["Resp. Br."] at 24-44, there is no reason to weaken the current *Miranda* regime.

ARGUMENT

I. HISTORY DEMONSTRATES THAT SOME LAW ENFORCEMENT AGENCIES WILL SEEK TO DILUTE *MIRANDA*

A. Overzealous Police Practices Continue To Exist

The Solicitor General has suggested that the Court should relax its rigorous enforcement of the warnings required by *Miranda* because "law enforcement agencies have little incentive to replace the conventional warnings with some other phrasing because doing so would increase both the risks of suppression and the litigation costs of defending any statement . . . ." SG Br. at 17 n.7. Indeed, the Solicitor General could only come up with three reasons why law enforcement officials may fail to give standard warnings: (1) a mistake by the officer in giving the warning; (2) a mistake in translating the *Miranda* warnings into a non-English language; and (3) when a change in circumstances, such as a foreign interrogation, may require the standard language be adapted to those circumstances. *Id.* at 13-14.

Most notably, the Solicitor General fails to identify one other possible reason law enforcement may not give the required warnings – and the reason that actually motivated this Court to adopt the *Miranda* rule in the first place – that law enforcement may be attempting to secure confessions through coercive practices. *See, e.g.*, *Miranda*, 384 U.S. at 444 (noting that the required warnings were being adopted as "procedural safeguards" against "overzealous police practices"). The Solicitor General merely states in a

footnote that "[n]othing in the record suggests that the Tampa police department adopted the particular warnings at issue here for the purpose of undermining the protections of *Miranda*." SG Br. at 16 n.6.

While Professor Leo does not dispute the Solicitor General's suggestion that most law enforcement officers throughout the country follow *Miranda*'s dictates, he does take issue with the assumptions seemingly underlying the Solicitor General's support of Florida here. This Court did not adopt the *Miranda* rule out of a perceived need to change the conduct of law enforcement officers generally, but to eliminate certain "overzealous police practices," which it saw as an "exception" to the usual practices – albeit practices that remained "sufficiently widespread to be the object of concern." *Miranda*, 384 U.S. at 447. Such "overzealous police practices" still exist today. Indeed, this Court only recently had to invalidate an interrogation strategy, "which by any objective measure reveal[ed] a police strategy adapted to undermine the *Miranda* warnings." *Missouri v. Seibert*, 542 U.S. 600, 616 (2000) (plurality); *id.* at 618 (Kennedy, J., concurring) ("The interrogation technique used in this case is designed to circumvent *Miranda v. Arizona*."). And, as in *Seibert*, there is every indication that the warnings read to Mr. Powell by the Tampa Police Department were changed from the standard *Miranda* warning for the purpose of circumventing *Miranda*.

The reason law enforcement generally follows the requirements of *Miranda*, as the Solicitor General claims, is that law enforcement understands that this Court is serious about enforcing the *Miranda* rule. Providing the warning is "simple" and easy for courts

to enforce because "a warning is a clearcut fact," which in practice often eliminates the otherwise thorny questions concerning whether a confession was made voluntarily. *Miranda*, 384 U.S. at 468-69 (explaining that in the absence of a simple warning, determining whether a statement was made voluntarily requires "speculation"); *see Seibert*, 542 U.S. at 608-09 (explaining that *Miranda* helps the government because "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility"); *California v. Prysock*, 453 U.S. 355, 359 (1981) (explaining that courts have "stressed as one of the virtues of *Miranda* the fact that the giving of the warning obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused"). But if the Court were to permit the warning at issue here to stand, then those who the *Miranda* rule was designed to deter will find it easier to circumvent the spirit, if not the letter, of *Miranda*.

B. Numerous Studies Have Documented Law Enforcement's Efforts To Evade *Miranda*'s Goals

Although the inauguration of *Miranda* warnings largely ended the era of "third-degree" interrogations, Miranda *Revisited*, at 688, and fostered increased professionalism in the treatment of suspects by interrogators, Richard A. Leo, Miranda*'s Irrelevance, Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1026 (2001) ["Miranda*'s Irrelevance*"], this does not mean that the ultimate aims of *Miranda* have been accepted by all in law enforcement. Instead, some law enforcement personnel have tended to respect the letter of *Miranda* but not its spirit, with some officers even openly

admitting that they think to themselves: "How can we get around *Miranda*, what is the best way, the quickest way to get through this thing, song and dance it, sugarcoat it, or whatever." Miranda *Revisited*, at 665. As a result, numerous techniques have been designed and implemented to help interrogators control their suspects and prompt confessions, thereby diluting the very purpose of *Miranda*. Miranda's *Irrelevance*, at 1003.

Shortly after *Miranda* was decided, the legal and social science communities began empirical studies to identify and analyze police implementation of, and compliance with, the new *Miranda* requirements. These scholars also analyzed law enforcement attitudes toward *Miranda*; how *Miranda* warnings affect police and suspect behavior during interrogation; and the impact of *Miranda* on confession, clearance and conviction rates. *Id.* at 1002. The early studies were largely completed by 1973, but there was a renewed interest in *Miranda*'s effects during the mid-1990s, and a second round of empirical *Miranda* impact studies has been conducted over the last fifteen years. *Id.* at 1005.

In a nutshell, the researchers generally agree that, despite some early hesitation, law enforcement agencies now appear to issue complete *Miranda* warnings in virtually all cases. This change is partially mitigated by police behavior, however, because law enforcement seem to have successfully "adapted" to the *Miranda* requirements by developing strategies and practices that are intended to induce *Miranda* waivers. *Id.*; *see* George C. Thomas III and Richard A. Leo, *The Effects of* Miranda v. Arizona: *"Embedded" in Our National Culture?*, 2002 Crime &

Just. 203, 244 (2002). Presumably because of consistent judicial interpretation of *Miranda*, for the most part, law enforcement agencies have not attempted to tinker with the actual language of the *Miranda* warnings set forth in the standard forms used throughout the country. Rather, the prevailing practice has been to undermine those warnings through their delivery. If the decision below is reversed, however, those in law enforcement who now use more subtle means to circumvent *Miranda*'s goals may be emboldened to make a frontal attack on *Miranda*'s core, by manipulating the language of the *Miranda* warnings themselves.

1. Police Possess a Variety of Interrogation Tactics to De-Emphasize *Miranda*

Although almost all law enforcement personnel read a *Miranda* warning standardized by their jurisdiction, interrogators often combine this reading with a variety of methods to blunt the effects of the actual *Miranda* warning. Miranda *Revisited*, at 650.[4]

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[4] Many of these techniques can be traced to "The Reid Method" developed by John E. Reid. The Reid Method is a system that is taught all across Florida to law enforcement officials. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 Cal. L. Rev. 1521, 1530-37 (2008) ["*Mourning* Miranda"]. The Reid Method, which has trained over 300,000 law enforcement officers in the last thirty-five years, uses nine steps to systematically break down the resistances of a suspect through isolation, sympathy and direct confrontation. *Id.* at 1530-32. The Method also stresses the importance of talking, suggesting clemency for confession and ignoring denials. *Id.* at 1532-33. The method even specifies what technical alterations to the interrogation room should be made to maximize stress and a desire to confess in suspects – of particular

One of the most common strategies employed by police interrogators is to de-emphasize the significance of the *Miranda* warnings. Richard A. Leo & Welsh S. White, *Adapting To* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 433 (1999) ["*Adapting to* Miranda"]. Interrogators typically begin the interrogation by engaging in small talk with the suspect to build rapport. *Id.* When the *Miranda* warning is eventually mentioned, the interrogator portrays the reading of the warnings as an unimportant bureaucratic ritual and communicates either implicitly or explicitly that he expects the suspect will waive his rights as a matter of course. *Id.* Alternatively, some interrogators de-emphasize the warnings by blending them into the conversation, suggesting the warnings are nothing that should concern the suspect. *Id.* at 433-34. By de-emphasizing the significance and substance of the warnings, the police increase the likelihood these warnings will be waived.

Overt de-emphasis is far from the only tactical strategy available to interrogators. Another strategy is to call attention to the formality of the warnings, and suggest they are simply a matter of routine that must be dispensed with. *Id.* at 434. Other interrogators attempt to banalize the *Miranda*

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note is the Method's directive that "[chairs] should be straight-backed, and the manuals contain diagrams showing how the chairs should be positioned." *Id.* at 1532. The Reid Method is a prime example of how law enforcement seeks every advantage in the interrogation room, and it demonstrates that while police have an incentive to follow the letter of *Miranda*, their actions often fail to live up to *Miranda*'s ideals.

warning by referring to the fact that the warning is the same as those a suspect has seen on television. *Id.* at 434-35. Such moves drain the warning of its legal significance by suggesting that it is just a bureaucratic practice, rather than a critical moment during questioning. *Id.*

Interrogators also understate the importance of the *Miranda* warnings by focusing on how important it is for the suspect to tell his side of the story and for the police to hear his version. *Id.* at 435-36. This strategy telegraphs to the suspect that he will receive a benefit from the police in exchange for waiving his *Miranda* rights. Indeed, explicitly offering a suspect a benefit in exchange for waiving his right to an attorney under *Miranda* is another technique that often is employed by police interrogators. *Id.* at 440-47.

2. There Are Strategic Customs that Minimize the Impact of *Miranda*

Beyond these tactical innovations in the interrogation room itself, law enforcement has created a number of systemic customs that tilt interrogations in their favor. For instance, law enforcement seek to dodge the obstacles of *Miranda* by casting interrogations as non-custodial in nature or aiming to get an implicit waiver. Miranda's *Irrelevance*, at 1017. Because *Miranda* is implicated only when a suspect is legally in custody, law enforcement simply tell the suspect that he is not under arrest and free to leave at any time. *Id.* Such offers are often made only after police have transported a suspect to a station with the express purpose of questioning him, with the result that a suspect does not actually feel free to leave and therefore frequently makes an incriminating

statement. *See id.* Similarly, police around the country are now educated regularly on how to get suspects to give an implied waiver, a refusal of their rights under *Miranda* without an express statement to that effect. *Mourning* Miranda, at 1585. Such educations focus on the "strategic advantages of implied waivers" and encourage interrogators to regard any statement by the suspect "to the officer [as] an implied waiver of his right to remain silent." *Id.* at 1586.

Even if a suspect does attempt to invoke his *Miranda* rights, law enforcement personnel have been trained to continue interrogating the suspect if they believe they will not be alone with the suspect again. *Adapting to* Miranda, at 448-49. In such a "one-shot" situation, an interrogator may seek to either question the suspect outside *Miranda* or even try to change the suspect's mind. *Id.* Although such persuasion can be as subtle as an interrogator responding to a suspect's request for an attorney by asking why she wants an attorney, it can be extremely effective. *Id.*

As these brief examples from the literature on the empirical studies of *Miranda* show, law enforcement use many techniques to undermine the aims of *Miranda*. Thus, the Solicitor General's assumption that law enforcement would have no incentive to deviate from the standard warning, *see* SG Br. at 6, 16, is inconsistent with the empirical research, which demonstrates that many in law enforcement believe they have every incentive to dilute *Miranda* and will weaken *Miranda* in practice when they perceive an ability to do so. The assumption also is contrary to the practices in Tampa that led to this case.

II. THE TAMPA POLICE DEPARTMENT'S TREATMENT OF *MIRANDA* DEMONSTRATES THAT SOME LAW ENFORCEMENT AGENCIES WILL SEEK TO DILUTE *MIRANDA*

The Solicitor General gives weight to the fact that "[n]othing in the record suggests that the Tampa police department adopted the particular warnings at issue here for the purpose of undermining the protections of *Miranda*." SG Br. at 16 n.6. Viewing the record in that light puts blinders on to the empirical studies discussed above, and it also is contrary to Florida's experience with forms like the one at issue here.

Ever since this Court decided *Miranda*, it has been clear that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him *during* interrogation . . . ." *Miranda*, 384 U.S. at 471 (emphasis added); *see Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) ("during interrogation"); *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) ("during questioning"); *Davis v. United States*, 512 U.S. 452, 457 (1994) ("during questioning"); *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) ("before and during questioning"); *California v. Prysock*, 453 U.S. 355, 361 (1981) ("prior to and during interrogation"); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) ("during custodial interrogation"); *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) ("during interrogation"). It also is not difficult for law enforcement to clearly instruct someone being interrogated that they have the right to counsel during questioning. As the Solicitor General notes, while the exact language used in the warnings by federal law enforcement vary somewhat, every federal law enforcement agency provides warnings that explicitly

advise of the right to counsel during questioning. SG Br. at 12 & n.3 (listing and quoting from forms).[5]

Moreover, the Tampa Police Department did not have to look to federal law enforcement for a template that would call attention to the right to counsel "during" questioning. Even within Florida at the time of Mr. Powell's questioning in 2004, notice of the right to counsel during questioning was given in nearly all of the *Miranda* forms in use in that state. *Roberts v. State*, 874 So. 2d 1225, 1227 (Fla. 4th Dist. Ct. App.

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[5] While the Solicitor General may be correct that all of the forms "at present" expressly advise suspects of their full rights, this was not the case even four years ago in Florida. In the summer of 2005, a federal court in Florida threw out the statements of four men accused of drug-smuggling because the Department of Homeland Security used a faulty standard warning form similar to the one at issue here. *United States v. Taylor*, No. 05-60072-CR, Court Order (S.D. Fla. Aug. 9, 2005) (adopting July 26, 2005 Magistrate Judge's Report finding a *Miranda* violation). Like the warning form now before this Court, the Homeland Security form provided: "You have the right to talk to a lawyer for advice before we ask you any questions," but it did not also mention the constitutional right to an attorney during questioning. *United States v. Taylor*, No. 05-60072-CR, Magistrate Judge's Report and Recommendation at 5 (S.D. Fla. July 26, 2005). Although Homeland Security reportedly was surprised to learn that one of its field offices was using a deficient form and undertook efforts to standardize its warning forms nationally, this episode underscores the fact that even some in the federal government are not immune from the desire to minimize *Miranda* warnings. Paula McMahon & Ihosvani Rodriguez, *Feds Make* Miranda *Blunder; Drug Case Error Similar to Broward's*, South Fla. Sun-Sentinel, Aug. 6, 2005, at 1B.

2004);[6] *see Rigterink v. State*, 2 So. 3d 221 (Fla. 2009) (noting the "vast majority" of Florida's law enforcement agencies give such warnings), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229). Indeed, in a survey of more than 900 *Miranda* forms in use nationwide, all but five of the surveyed forms contained language specifically advising of the right to counsel during questioning. SG Br. at 13 n.4 (citing Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124, 131 (2008)).

In fact, the Tampa Police Department used to give the correct and standard "during" instruction, but later amended its standard forms to omit that *Miranda* warning. The "Consent to be Interviewed" form (Tampa Police Department Form 310) that previously was used by the Tampa police required a suspect to sign a waiver that included this sentence: "I further understand that *prior to or during* this interview that I have the right to have an attorney present."

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[6] The *Roberts* court took judicial notice of 90 *Miranda* forms (including the Broward County form at issue in that case) used by law enforcement agencies throughout Florida and noted that 89 of them "contained the warning that the accused is entitled to an attorney during questioning, or words to that effect." *Roberts*, 874 So. 2d at 1227. While the *Roberts* court correctly recognized that warnings like the ones given Powell are extreme outliers, the court's tally appears slightly off. It appears that 4 of the 90 forms in the *Roberts* record – 2 from Broward County, 1 from the Bartow Police Department and the 1 from the Tampa Police Department at issue in this case – advise of only the right to counsel before questioning. A chart reflecting the relevant language from these 90 forms, and the actual forms themselves, are attached as Appendix A.

(emphasis added). *See Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992) (describing form used by Tampa police in 1986).

Given that warnings advising of the right to counsel "during" questioning have been required repeatedly by this Court, that such warnings are included in nearly all *Miranda* forms in use both nationally and in Florida, and that the Tampa Police Department actually had a form that contained such language, why would the Tampa Police Department change its *Miranda* form?[7] Petitioner has not offered any explanation for why Tampa chose to break from its prior practice and the standard *Miranda* warnings used by law enforcement both nationally and throughout Florida. While the record does not firmly establish the Tampa Police Department's motives for changing the standard language of its *Miranda* forms, the empirical research demonstrating that law enforcement often manipulates its interrogation strategies to undermine *Miranda* casts doubt upon the Solicitor General's presumption that there is some innocuous explanation for the change.

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[7] The *Miranda* warnings in this case were given to the Respondent in the following formulation:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

JA at 3.

That doubt builds when the Tampa Police Department's approach to other aspects of *Miranda* are considered. On June 30, 2009, the Tampa Police Department issued a Legal Bulletin advising personnel regarding this Court's *Montejo* decision. That Legal Bulletin advised officers that because they "must scrupulously honor a suspect's request for a lawyer, it is obviously better from a law enforcement perspective if the suspect does not request a lawyer." Tampa Police Department, Legal Bulletin #09-14, at 2 (App. B).

The Legal Bulletin then outlined several techniques that officers could use to minimize the chance that a suspect will invoke his right to counsel. For instance, the Legal Bulletin advised that officers should give the *Miranda* warning in parts. They should first advise a suspect of his right to remain silent, followed by asking the suspect if he would like to talk to the officer. If the suspect is willing to talk, then the officer is advised to continue the *Miranda* warning and advise the suspect of his right to counsel. If the suspect states that he does not wish to talk after being advised of his right to remain silent, the bulletin advises that there is no need to mention his right to counsel. This omission decreases the probability that the suspect will automatically invoke his right to counsel. The bulletin advises officers to re-approach a suspect who has invoked his right to remain silent in a few minutes or a few hours to see if he has changed his mind. *Id.* at 2-3.

In addition to instructing its officers to give *Miranda* warnings in separate parts to discourage access to counsel, the Legal Bulletin also advised its officers not to give *Miranda* warnings as a matter of

course to every suspect or person that is arrested, but only to those that specifically need to be questioned in custody. *Id.* at 2. It further advises officers that they can avoid *Miranda* altogether if they are able to conduct their questioning when a suspect is outside of custody or as part of a general inquiry. *Id.* If a *Miranda* warning must be given, the officers are told to do all that they can to lessen the chances that a suspect will request a lawyer.[8] This advisory appears directly contrary to the Solicitor General's assumptions concerning the reason the form was changed.

Beyond Tampa, the flaws in the Solicitor General's assumptions are revealed by the experience of another Florida law enforcement agency that chose to use a similar form. In Broward County between February 1999 and November 2002, sheriff's deputies used a *Miranda* rights form like the one at issue in this case that advised suspects that they could request an attorney before questioning, but omitted mentioning that they have the right to have an attorney present during questioning. In a letter to the Broward County Sheriff in May 2001, State Attorney Michael Satz

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[8] These sorts of law enforcement legal memoranda are not uncommon. In Los Angeles County, a training memo from the District Attorney's office stressed the numerous situations in which a suspect's statement in a custodial interview can be admitted despite the absence of a *Miranda* warning. The memo then implicitly encouraged interrogators not to give *Miranda* warnings at all, rhetorically asking if "knowledge of *the truth* about *Miranda* [might] sometimes cause an interrogating officer to conclude that s/he might have something to gain through custodial interrogation without waivers?" *Mourning* Miranda, at 1554.

reportedly "most strongly" recommended changing the form to include a statement that explicitly advised suspects of the right to an attorney during questioning. Jon Burstein, Miranda *Mess Imperils Convictions; Single Missing Word On Form Lets Accused Killers Walk*, South Fla. Sun-Sentinel, Jul. 13, 2005, at 1A. The Sherriff's Office reportedly dismissed the State Attorney's suggestions and continued to use the form that excluded reference to the right to the presence of an attorney during questioning. *Id.* Additionally, in response to the State Attorney's advice to change the form, a Lieutenant Colonel in the county Sheriff's Office wrote in an internal memorandum that, "[a]dding additional cautionary warnings pertaining to a suspect's rights to counsel are not mandated by law and are in my opinion an additional obstacle for our investigators to overcome." *Id.*

Professor Leo's research documents a great number of subtle ways that law enforcement has sought to undermine the *Miranda* warnings, but there are few instances where a major law enforcement agency (as opposed to a rogue officer) has sought to thwart *Miranda* by manipulating the actual language of the warnings themselves. While the more subtle attacks upon *Miranda* have done considerable damage to the significance of the warnings, the warning form at issue here is contrary to the very core of *Miranda*. If this Court were to allow such warnings to suffice, *Miranda*'s prophylactic rule will fail to protect against much at all in the real world.[9]

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[9] Admittedly, Professor Leo believes that the original ruling of *Miranda* has been whittled down over the last several decades to the point that much of its original goals have been lost. Miranda's

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If the Court affirms the decision by the Florida Supreme Court, the Court will do nothing more than confirm existing practices in nearly every jurisdiction across the county. Should the Court reverse, however, it will create incentives for law enforcement nationwide to experiment with the *Miranda* warnings as they are now given, providing further opportunity to law enforcement to change the standard *Miranda* formulation in an effort to dilute the warning. Indeed, the history of *Miranda* demonstrates that some law enforcement agencies and officials will seek to do just that. The result will likely be protracted litigation over less-than-clear warnings. The Court should preserve *Miranda*'s requirements and affirm the decision below.

Irrelevance, at 1025-26. He believes that courts have been too quick in concluding that a confession was made voluntarily simply because the required warning was literally given, even though the warning was given in a manner that was designed to make the warning less meaningful. Professor Leo believes the situation would be greatly improved by requiring all interrogations be videotaped. Nevertheless, the present situation would be made worse by this Court holding that Tampa's form does not violate *Miranda* and condoning a frontal assault on the very heart of *Miranda*.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Compendium of *Miranda* Language in Florida

Jurisdiction	Language
Alachua County Sheriff's Office	"You have the right to talk to a lawyer for advice before being questioned, and you have the right to have him/her with you while being questioned. If you cannot afford to hire a lawyer, one will be provided for you. Do you understand?
Baker County Sheriff's Office	"You are entitled to talk to an attorney now and have him present now or at any time during questioning."
Bay County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Bradford County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Brevard County Sheriff's Office	"I have the right to consult with a lawyer. I have the right to have a lawyer present during this interview."
Broward County Sheriff's Office	"You have the right to talk with a lawyer and have a lawyer present before any questioning."

Plantation Police Department 174a
City of Sanford Police Department 177a
Sarasota Police Department 179a
St. Petersburg Police Department 182a
Stuart Police Department 184a
Tallahassee Police Department 186a
Tampa Police Department 190a
Unknown 193a
Vero Beach Police Department 195a
Florida Highway Patrol 196a
Florida Department of Law Enforcement .. 198a
State Attorney, First Circuit 200a
State Attorney, Second Circuit 202a
State Attorney, Seventh Circuit 206a
State Attorney, Tenth Circuit 209a
State Attorney, Fifteenth Circuit 211a
State Attorney, Sixteenth Circuit 214a
State Attorney, Nineteenth Circuit 219a
State Attorney, Twentieth Circuit 222a
Unknown 226a
Unknown 228a
Broward County Sheriff's Department (1999) 230a
FBI Form 232a

Appendix B: Tampa Police Department, Legal Bulletin #09-14 (June 30, 2009) 234a

Okaloosa County Sheriff's Department 87a
Okeechobee County Sheriff's Office 89a
Orange County Sheriff's Office 92a
Palm Beach County Sheriff's Office 93a
Pasco County Sheriff's Office 95a
Pinellas County Sheriff's Department 98a
Putnam County Sheriff's Office 100a
Santa Rosa County Sheriff's Office 102a
Sarasota County Sheriff's Office 104a
Seminole County Sheriff's Office 108a
St. Lucie County Sheriff's Office 114a
Sumter County Sheriff's Office 117a
Suwannee County Sheriff's Office 121a
Union County Sheriff's Department 123a
Volusia County Sheriff's Office 124a
Walton County Sheriff's Office 126a
Wakulla County Sheriff's Office 128a
Washington County Sheriff's Department . 130a
Bartow Police Department 132a
Bradenton Police Department 135a
Town of Davie Police Department 136a
Coconut Creek Public Safety Department . 138a
Fort Myers Police Department 140a
City of Fort Pierce Police Department 142a
Gainesville Police Department 144a
Hialeah Police Department 147a
Key West Police 149a
Lauderhill Police Department 152a
Margate Police Department 155a
Melbourne Police Department 157a
Ocala Police Department 161a
Village of North Palm Beach Public
Safety Department 163a
Palm Beach Police Department 164a
Palm Beach Gardens Police Department .. 166a
Pensacola Police Department 172a

Appendix A: Summary Chart and *Miranda* Forms Used in Florida 1a

Alachua County Sheriff's Office 1a
Baker County Sheriff's Office 4a
Bay County Sheriff's Office 9a
Bradford County Sheriff's Office 13a
Brevard County Sheriff's Office 15a
Broward County Sheriff's Office 18a
Calhoun County Sheriff's Office 20a
Charlotte County Sheriff's Office 22a
Citrus County Sheriff's Office 25a
Clay County Sheriff's Office 29a
Collier County Sheriff's Office 31a
Columbia County Sheriff's Office 35a
DeSoto County Sheriff's Office 38a
Duval County (City of Jacksonville) Sheriff's Office 40a
Escambia County Sheriff's Office 42a
Flagler County Sheriff's Office 44a
Glades County Sheriff's Office 46a
Hendry County Sheriff's Office 48a
Hernando County Sheriff's Office 51a
Highlands County Sheriff's Department ... 55a
Holmes County Sheriff's Department 57a
Jackson County Sheriff's Department 59a
Jefferson County Sheriff's Department 61a
Lake County Sheriff's Office 65a
Lee County Sheriff's Office 68a
Leon County Sheriff's Office 70a
Levy County Sheriff's Office 72a
Liberty County Sheriff's Office 75a
Madison County Sheriff's Office 79a
Manatee County Sheriff's Office 81a
Marion County Sheriff's Office 83a
Martin County Sheriff's Office 85a

Jurisdiction	Language
Calhoun County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Charlotte County Sheriff's Office	"You have the right to talk to an attorney and have him present with you while you are being questioned."
Citrus County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Clay County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Collier County Sheriff's Office	"I have the right to talk to a lawyer and have him present with me while I am being questioned."
Columbia County Sheriff's Office	"If you wish, you have the right to call or obtain an attorney at this time and ask his advice before saying anything, and to have him with you during any questioning."
DeSoto County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Duval County (City of Jacksonville) Sheriff's Office	"You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you, and to have the lawyer with you during any questioning."

Jurisdiction	Language
Escambia County Sheriff's Office	"You have the right to have a lawyer present while being questioned."
Flagler County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Glades County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Hendry County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Hernando County Sheriff's Office	"You have the right to talk to a lawyer and have one present with you while you are being questioned."
Highlands County Sheriff's Department	"You have the Right to talk to a lawyer for advice before we ask you any questions and to have hi with you during questioning if you wish. Do you understand?"
Holmes County Sheriff's Department	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Jackson County Sheriff's Department	"You have the right to consult with a lawyer before you answer any questions or make any statement and to have him present during questioning."

Jurisdiction	Language
Jefferson County Sheriff's Department	"I further understand that prior to or during this interview that I have the right to have an attorney present."
Lake County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Lee County Sheriff's Office	"Anything you say can be used as evidence against you in court. If you wish, you have the right to call or obtain an attorney at this time and ask his advice before saying anything, and to have him with you during any questioning."
Leon County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you during questioning."
Levy County Sheriff's Office	"You have the right to talk to a lawyer for advice before being questioned. You have the right to have him/her with you while being questioned."
Liberty County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her present with you during questioning."
Madison County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."

Jurisdiction	Language
Manatee County Sheriff's Office	"You have the right to talk to an attorney and have him/her present with you while you are being questioned."
Marion County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Martin County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Okaloosa County Sheriff's Department	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Okeechobee County Sheriff's Office	"You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning. Do you understand that right?"
Orange County Sheriff's Office	"You are entitled to talk to an attorney now and have him present now or at any time during questioning."
Palm Beach County Sheriff's Office	"You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning."

Jurisdiction	Language
Pasco County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Pinellas County Sheriff's Department	"Do you understand that you have the right to talk to a lawyer and have him present with you while you are being questioned?"
Putnam County Sheriff's Office	"I have the right to talk to a lawyer and have him present with me while I am being questioned."
Santa Rosa County Sheriff's Office	"You have the right to have a lawyer present while being questioned."
Sarasota County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Seminole County Sheriff's Office	"You are entitled to talk to an attorney now and have him present now or at any time during questioning."
St. Lucie County Sheriff's Office	"I have the right to talk to a lawyer and have him present with me while I am being questioned."
Sumter County Sheriff's Office	"You have the right to talk to a lawyer and have him present with you while you are being questioned."

Jurisdiction	Language
Suwannee County Sheriff's Office	"You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning."
Union County Sheriff's Department	"You have the right to talk to a lawyer for advice before being questioned, and you have the right to have him with you while being questioned."
Volusia County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning."
Walton County Sheriff's Office	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Wakulla County Sheriff's Office	"You have the right to a lawyer for advice before we ask you any questions, and to have a lawyer present with you during questioning."
Washington County Sheriff's Department	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Bartow Police Department	"You have the right to talk to a lawyer before answering any of our questions."

Jurisdiction	Language
Bradenton Police Department	"You have the right to talk to a lawyer and have him Present with you while you are being questioned."
Town of Davie Police Department	"You have the right to consult with a lawyer before answering any questions, and to have him present while you are being questioned. Do you understand?"
Coconut Creek Public Safety Department	"You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning."
Fort Myers Police Department	"You have the right to talk to a lawyer for advice during questioning."
City of Fort Pierce Police Department	"You have the right to talk to an attorney for advice before we ask you any questions, and to have him with you during questioning."
Gainesville Police Department	"You have the right to talk to a lawyer for advice before being questioned, and you have the right to have him/her with you while being questioned. If you cannot afford to hire a lawyer, one will be provided for you. Do you understand that?"

Jurisdiction	Language
Hialeah Police Department	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Key West Police	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him you during questioning."
Lauderhill Police Department	"You are entitled to talk to an attorney now and have him present now or at any time during questioning."
Margate Police Department	"You have the right to speak to an attorney before speaking to the police and to have an attorney present during questioning now or in the future."
Melbourne Police Department	"You have the right to consult with a lawyer now and at any time during this interview, if you can not afford a lawyer, one will be provider [sic] for you, without cost to you at any time. Do you understand?"
Ocala Police Department	"That I have the right to talk to a lawyer and to have him present with me while I am being questioned."
Village of North Palm Beach Public Safety Department	"You have the right to the presence of a lawyer of your choice before you make any statements and during any questioning."

Jurisdiction	Language
Palm Beach Police Department	"You have the right to the presence of a lawyer of your choice before you make any statement and during any questioning."
Palm Beach Gardens Police Department	"You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning."
Pensacola Police Department	"You have the right to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Plantation Police Department	" 'You have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future' Do you understand?"
City of Sanford Police Department	"You are entitled to talk to an attorney now or have one present now or at any time during questioning."
Sarasota Police Department	"I understand that I have the right to talk to an attorney and have him present with me while I am being questioned."
St. Petersburg Police Department	"Do you understand that you have the right to have an attorney present while you are being questioned?"

Jurisdiction	Language
Stuart Police Department	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Tallahassee Police Department	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
Tampa Police Department	"You have the right to talk to a lawyer before answering any of our questions."
Unknown	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
Vero Beach Police Department	"You have the right to the presence of a lawyer of your choice before you make any statement and during any questioning."
Florida Highway Patrol	"You have the right to talk to a lawyer for advice before I ask you any questions and to have him with you during questioning."
Florida Department of Law Enforcement	"You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning."
State Attorney, First Circuit	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."

Jurisdiction	Language
State Attorney, Second Circuit	"You have the right to talk to a lawyer and have him present with you while you are being questioned."
State Attorney, Seventh Circuit	"You have the right to talk to an attorney and have him with you now or at any time during questioning; if you cannot afford an attorney, one will be appointed to represent you."
State Attorney, Tenth Circuit	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning."
State Attorney, Fifteenth Circuit	"You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning."
State Attorney, Sixteenth Circuit	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her present with you during questioning."
State Attorney, Nineteenth Circuit	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning."
State Attorney, Twentieth Circuit	"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning if you wish."

Jurisdiction	Language
Unknown	"You have the right to talk to a lawyer and have him present with you while you are questioned."
Unknown	"You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning."
Broward County Sheriff's Department (1999)	"You have the right to talk with a lawyer and have a lawyer present before any questioning."
FBI Form	"You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning."

APPENDIX A

ALACHUA COUNTY SHERIFF'S OFFICE
[SEAL] Gainesville, Florida

WAIVER OF RIGHTS FORM

_____
(Name of Individual)

Before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything or answer any questions. Anything that you say can and will be used against you in court.

Do you understand? ____ Signature: _____

You have the right to talk to a lawyer for advice before being questioned, and you have the right to have him/her with you while being questioned. If you cannot afford to hire a lawyer, one will be provided for you.

Do you understand? ____ Signature _____

If you want to answer questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering at any time you want to talk to a lawyer.

Do you understand? ____ Signature: _____

WAIVER

I have read or had read to me that statement of my rights as stated above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time, although I understand that I can have one. No promises or threats have been made by anyone to cause me to make a statement. I have not been mistreated or harmed by anyone to cause me to make a statement.

Signature: _____

What is your age? _____ Date of Birth? _____

Place of Birth? _____

How far did you go in school? _____

Do you understand the statement written above? _____

Are you presently under the influence of alcohol, drugs, or medication? _____

Signature: _____

Upon the inquiry as to this individual's mental condition, age, education, experience, the nature of the complexity of the case, and other factors, the following witnesses certify and attest to the signature of the individual above, before them, stating that no threats or coercion were made to the individual to persuade him/her to execute the above, and they have observed the individual prior to his/her signature and believe

his/her choice to be intelligent, understanding and voluntary.

Witness	Place
Witness	Date/Time

ACSO 93-04 REV 06/96

[SEAL] *Baker County*
Sheriff's Office

Waivers & Affidavits

Name of Person Signing:
Zone:
Case Number:
Type of Incident:
Deputy Name:
Date:

Miranda Warning

The constitution requires that I inform you that:

1. You have the right to remain silent.
2. Anything you say will be used in court as evidence against you.
3. You are entitled to talk to an attorney now and have him present now or at any time during questioning.
4. If you cannot afford an attorney, one will be appointed for you without cost.
5. Do you desire to consult with an attorney first or to have one during this interview? **YES** ☐ **NO** ☐
6. If, at any time hereafter, you wish to remain silent or have an attorney present, all questioning will be stopped.
7. Has anyone, at any time, threatened, coerced or promised you anything in order to induce you to make a statement now? **YES** ☐ **NO** ☐
8. Do you understand these rights? **YES** ☐ **NO** ☐
9. Do you wish to talk to us at this time? **YES** ☐ **NO** ☐

CONSENT TO SEARCH

I, [initial] consent and agree to allow Baker County Sheriff's Deputies and employees to search my _____, located at _____. I further consent and agree to allow Baker County Sheriff's Deputies and Employees to search all areas located in my _____, and all buildings, structures, and vehicles adjacent to my _____, including all containers located therein. My consent and agreement to search is freely given. I understand that I may refuse to allow Baker County Sheriff's Deputies and Employees to search my _____.

FORGED SIGNATURE AFFIDAVIT

_____, being duly sworn according to law deposes and says that _____ No. _____ purported to be signed by _____, drawn on the _____ dated _____, payable to the order of _____, the sum of _____ was not _____, by him/her or with his/her knowledge and consent. Said affiant further states that any signature which appears on said check as _____ is not his/her signature nor did he/she authorize said signature to be made. The affiant further states that he/she never received any benefit from said check or any part thereof, and further states that he/she did not present this check for negotiation or payment.

MISSING PERSON/JUVENILE RUNAWAY AFFIDAVIT

I, [initial] certify that _____ has been missing since _____.

I am the:

☐ Parent ☐ Family Member ☐ Legal Guardian ☐ Physician and/or other authoritative source of the above person.

The above listed person is missing due to: ( ) Runaway ( ) Unknown circumstances ( ) Physical/mental disability ( ) In the company of another person under circumstances indicating physical danger ( ) Involuntary disappearance. I give my permission to release dental records or any other medical records on the above missing person. I further agree to notify the Baker County Sheriff's Office immediately upon receiving any additional information concerning the above.

FALSE INFORMATION AFFIDAVIT

I, [initial] certify that the statements made to the above listed Baker County Sheriff's Office Law Enforcement Official concerning the above listed incident/offense were voluntarily made. I further certify that I am aware of the following statute and penalties as provided by Florida Statutes 837.05, 775.082 and 775.083 to wit: Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable by a definite term of imprisonment not exceeding one year or a fine not exceeding $1,000.

VEHICLE LOSS OR DAMAGE RELEASE AFFIDAVIT

I, [initial] give my permission in lieu of impounding by the Baker County Sheriff's Office for the

Year:
Make:
Model:
Body Style:
Color (Top/Bottom):
VIN:
Tag:
State:

that I have been operating to ( ) remain at: _____ ( ) be released to: _____ This decision was made by me after the Deputy listed above explained the possibility of damage or loss. By affixing my signature of this form, I release and hold harmless the Sheriff of Baker County of any and all responsibility for damage or loss which may occur as a result of the release of this vehicle as aforesaid.

DECLINATION OF INTENT

I, [initial] request not to prosecute _____ in regards to my complaint of _____. I do not desire further investigation to be conducted in this matter. I will not willingly testify and hold free and absolve from any further duty in regard to this matter the Baker County Sheriff and all its employees.

Sworn to and subscribed before me, the undersigned authority, this _____ day of _____, 20____.

_____ _____

Notary Public ☐ Law Enforcement Officer ☐

I swear and affirm the above statements are correct and true.

_____

Signature

WORLDWIDE
INVESTIGATIONS, INC.

May 2, 2002

Honorable Guy Tunnell
Bay County Sheriff
3421 N. Highway 77
Panama City, Florida 32405

Dear Sheriff Tunnell:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Department.

The form requested is the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material; and in that regard, I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC :lw
Enclosure

02-437

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

YOUR RIGHTS

Place: _____

Date: _____

Time: _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed: _____

Witness: _____

Witness: _____

Time: _____

BRADFORD COUNTY SHERIFF'S OFFICE
CRIMINAL INVESTIGATIONS DIVISION

CONSTITUTIONAL RIGHTS

Before you make any statement or answer any questions, you must fully understand your constitutional rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in court.

3. You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning.

4. If you cannot afford an attorney, the court will appoint one for you without cost and before any questioning.

5. If you decide to answer questions now, you have the right to stop answering at any time during questioning.

I have read the above statements and fully understands what my rights are.

(Signed) _____

(Date) _____

WAIVER OF RIGHTS

I have carefully read the above information concerning my constitutional rights and I fully understand what my rights are. Knowing these rights, I am willing to make a statement at this time and answer questions posed to me without the presence of an attorney. I have made this decision knowingly, intelligently, and voluntarily. No promises, threats, or inducements of any kind have been made to me, nor has any pressure or coercion been used against me, in order to obtain my statement or to persuade me to answer questions.

(Signed)_____

(Date)_____

PERSON EXPLAINING RIGHTS:_____

WITNESS:_____

TIME & DATE: _____

PLACE: _____

_____

BREVARD COUNTY SHERIFF'S OFFICE
STATEMENT OF SUSPECT

I. STATEMENT INFORMATION

INTERVIEWING DEPUTY/AGENT
DATE
TIME
LOCATION
CASE REPORT #

II. PERSONAL IDENTIFICATION

NAME (LAST, FIRST, MIDDLE)
RACE / GENDER
DATE OF BIRTH
TELEPHONE (HOME) (WORK)

HOME ADDRESS
WORK ADDRESS

III. ACKNOWLEDGEMENT OF OFFENSES AND MIRANDA RIGHTS

I have been advised that I am suspected of the following offenses:

SUSPECT INITIALS	**and I have been advised that I have the following rights according to the 5th Amendment to the U.S. Constitution.**
	I have the right to remain silent
	Any statement I make can be used against me in court.

	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	If I cannot afford a lawyer and want one, a lawyer will be appointed for me.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
SUSPECT INITIALS	**I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me. I make the following choice. (Initial One)**
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offenses(s) under investigation.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.
	I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER
PAGE OF PAGES	

[SEAL]
SHERIFF'S OFFICE
BROWARD COUNTY
SHERIFF KEN JENNE

MIRANDA WARNING

BEFORE I ASK YOU ANY QUESTIONS, I WANT TO ADVISE YOU OF YOUR CONSTITUTIONAL RIGHTS.

1. You have the right to remain silent.

2. Anything you say can be used against you in a court of law.

3. You have the right to talk with a lawyer and have a lawyer present before any questioning.

4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.

Do you understand each of these rights I have read to you? _____

WAIVER OF RIGHTS

I, _____, have read this statement of my rights or have had it read to me and I understand what my rights are. With these rights in mind I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.

_____
Signature Date/Time

_____

Witness Signature Date/Time

_____

Deputy Signature/CCN Date/Time

Location: _____

Case#:_____

BSO RP#17A (New 2/99)

[SEAL]
CALHOUN COUNTY
DAVID L. TATUM
SHERIFF

Statement of Miranda Rights

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Waiver of Rights

I have read the above statements of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

_____

Witnessed by:

_____
Officer's Name

_____
Officer's Department

Date: _____, 19 ____
Time: _____M.

CHARLOTTE COUNTY SHERIFF'S OFFICE
PUNTA GORDA, FL 33982

MIRANDA WARNING AND WAIVER OF RIGHTS

OCA _____

NAME: _____

D.O.B.: _____

ID#: _____ BOOKING #: _____

MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.

2. ANYTHING YOU SAY CAN BE USED AGAINST YOU IN A COURT OF LAW.

3. YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.

4. IF YOU WANT AN ATTORNEY AND CANNOT AFFORD ONE, AN ATTORNEY WILL BE APPOINTED TO REPRESENT YOU, FREE OF CHARGE, BEFORE ANY QUESTIONING.

5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENT.

1. DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU:

YES / NO _____ INITIALS _____

2. HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO ME NOW:

YES / NO _____ INITIALS _____

_____
(PRINT) NAME OF ARRESTING DEPUTY / ID#

_____
SIGNATURE OF ARRESTING DEPUTY

_____
SIGNATURE OF DEFENDANT

_____
SIGNATURE OF PARENT / GUARDIAN

_____
DATE / TIME

WAIVER OF RIGHTS

I HAVE READ THIS STATEMENT OF RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE. I AM

WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS. I DO NOT WANT AN ATTORNEY AT THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME.

_____

SIGNATURE OF DEFENDANT

_____

SIGNATURE OF DEPUTY / ID#

_____

SIGNATURE OF WITNESS / ID#

INV-RP.3.112000

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Citrus County Sheriff
1 South Park Avenue
Inverness, Florida 34450

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC:lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

Statement of Miranda Rights

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY OR DO CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH.
5. YOU CAN DECIDE AT ANY TIME TO USE THESE RIGHTS AND STOP ANSWERING QUESTIONS OR REFUSE TO MAKE A STATEMENT

Waiver of Rights

I HAVE READ THE ABOVE STATEMENT OF MY RIGHTS AND I UNDERSTAND EACH OF THOSE RIGHTS, AND HAVING THESE RIGHTS IN MIND I WAIVE THEM AND WILLINGLY MAKE A STATEMENT.

SIGNED: _____
Age _____
Address _____
Date _____ Time _____ Location _____
Witnessed by: _____ Witnessed by: _____
Witnessed by: _____ Witnessed by: _____

THE ABOVE STATEMENT OF RIGHTS
WERE READ TO:

Full Name_____ S.S. No_____

Race ____ Sex ____ D.O.B. _____ Ht. ____
Wt. _____ Hair _____ Eyes _____
Marks, Cars, Tattoos _____
Address _____ Phone _____

Occupation_____
SCHOOL, OR EMPLOYER,
ADDRESS AND PHONE NUMBER

Education _____
HIGHEST GRADE ACHIEVED

School _____ Read English ? _____
YES/NO

Last Ate _____ _____ Wha: _____
TIME DATE

Last Slept _____ _____
TIME DATE

Health_____ Complaints _____
Attitude_____
Place of Birth _____ Marital Status _____

Spouse: _____
NAME, ADDRESS, PHONE IF MARRIED

Mother's Name _____ Address _____
Father's Name _____ Address _____
Comments _____

OFFICER'S SIGNATURE _____ DEPT ____
DATE _____ TIME _____ CASE _____

Clay County Sheriff's Office
Clay County, Florida

YOUR CONSTITUTIONAL RIGHTS

PLACE: _____

DATE: _____

TIME: _____

YOU HAVE THE FOLLOWING RIGHTS UNDER THE UNITED STATES CONSTITUTION

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer and have him present with you while you are being questioned.

If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning, if you wish.

You can decide, at any time, to exercise these rights and not answer any questions or make any statements.

I HAVE carefully read and listened to the above information and **I fully understand my rights.**

_____

Witness/Person Explaining Rights

_____

Witness

_____

Signature

_____

Name (Print)

_____

Address (Street)

_____

City State ZIP

CSO/P-023 (rev 11/93)

WORLDWIDE
INVESTIGATIONS. INC.

April 2, 2002

Collier County Sheriff
3301 Tamiami Trail E.
Courthouse Complex Bldg. J
Naples, Florida 34112

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC:lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

MIRANDA WARNING

1. I have the right to remain silent.

2. Anything I say can and will be used against me in a court of law.

3. I have the right to talk to a lawyer and have him present with me while I am being questioned.

4. If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish.

5. I can decide at any time to exercise these rights and not answer any questions or make any statements.

   I understand each of these rights.

   Having these rights in mind, I wish to talk to you now.

_____	_____
(WITNESS)	(DEFENDANT)
_____	_____
(DATE)	(TIME)

1. Yo tengo el derecho do quedarme callado.

2. Caulquier cosa que diga puede emplearse y se empleara en contra de mi en el juzgado.

3. Yo tengo el derecho de hablar con un abogado y de pedirle que este presente mientras que me interogan.

4. Si yo no puedo pagar a un abogado, se nombrara uno para representarme antes de que me interroguen, si lo deseo yo.

5. Yo puendo decidir cuano quiera ejercer estos derechos y no contestar ningunas preguntas ni hacer ningunas declaracions.

Yo entiendo cada uno de estos derechos.

Teniendo en cuenta estos derechos, yo quiero hablar con ustedes ahora.

_____ _____

(TESTIGO) (DEFENDIENTE) (FECHA)

[SEAL]

FRANK E. OWENS, SHERIFF
COLUMBIA COUNTY
POST OFFICE BOX 650,
LAKE CITY, FLORIDA 32056-0650

Residence 752-3430
Emergency Communications 752-3222
Administrative Office 752-9212
Investigations 752-7015
Patrol 758-1376
Detention Center 755-7000

May 5, 2002

Worldwide Investigations, Inc.
750 S. E. Third Ave., Suite 201
Fort Lauderdale, Fl.33316

RE: Miranda Waiver

Mr. Cacciatore

I received your request for a copy of the currently used Miranda Waiver thats signed and initialled by the suspect. I am sending you the current form. If you have any questions, please feel free to contact me.

Sincerely,

/s/Wayne Keen
Dir: Wayne Keen

YOUR RIGHTS

Before we ask you any questions concerning an alleged _____ you must fully understand your rights.

You have the right to remain silent.

Anything you say can and will be used as evidence against you in court.

If you wish, you have the right to call or obtain an attorney at this time and ask his advice before saying anything, and to have him with you during any questioning.

If you want an attorney and cannot afford to hire one, the court will appoint one for you and you have a right to this court appointed attorney's advice before saying anything and to have him present with you during any questioning.

If you decide to answer questions now and waive your rights to first talk with an attorney or have an attorney present with you during questioning, you will still have the right to stop answering at any time until you talk to a lawyer.

(Signed) _____

WAIVER OF RIGHTS

I have carefully read the above statement and I fully understand what my rights are. I do not want an attorney at this time and I am willing to make a statement and answer any questions concerning this investigation. I fully understand and know what I am

doing. No promises, threats, or inducements have been made to me and no pressure or coercion of any kind has been used against me.

(Signed) _____

Witness: _____

Witness: _____

Time & Date: _____

Place: _____

DESOTO COUNTY SHERIFF'S OFFICE

NAME: _____

DOB: _____

SS.#_____

MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.

2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.

3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.

4. IF YOU CAN NOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH.

5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENT.

1. DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU? _____.

2. HAVE YOU PREVIOUSLY REQUESTED ANY LAW ENFORCEMENT OFFICER TO ALLOW YOU TO SPEAK TO AN ATTORNEY? _____

3. HAVING THESE RIGHTS RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW? _____.

_____
DEFENDANT SIGNATURE

_____
OFFICER SIGNATURE ID# DATE: _____

_____
WITNESS SIGNATURE ID# TIME: _____

WAIVER OF RIGHTS

I HAVE READ THIS STATEMENT OF RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE. I AM WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS. I DO NOT WANT AN ATTORNEY AT THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME.

_____
DEFENDANT SIGNATURE

_____
OFFICER SIGNATURE ID#

_____
WITNESS SIGNATURE ID #

OFFICE OF THE SHERIFF
CONSOLIDATED CITY OF JACKSONVILLE

CONSTITUTIONAL RIGHTS

PLACE: _____

DATE: _____

TIME: _____

You have the following rights under the United States Constitution:

- You do not have to make a statement or say anything.
- Anything you say can be used against you in court.
- You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you, and to have the lawyer with you during any questioning.
- If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish.
- If you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer.

_____
Signature

_____
Witness

_____
Witness

RON McNESBY [SEAL] P.O. BOX 18770
ESCAMBIA COUNTY PENSACOLA, FL 32523
SHERIFF (850) 436-9630

ESCAMBIA COUNTY SHERIFF'S OFFICE

THIS IS AN OFFICIAL FORM OF THE ESCAMBIA COUNTY SHERIFF'S OFFICE. IT IS PART OF AN INVESTIGATIVE PROCEDURE AND MUST BE COMPLETED BY ALL OFFICERS OF THE ESCAMBIA COUNTY SHERIFF'S OFFICE.

PLACE: _____

_____

TIME: _____

DATE: _____

BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS. (Initial each)

___1. You have the right to remain silent.

___2. Anything you say can be used as evidence against you in court.

___3. You have the right to have a lawyer present while being questioned.

___4. If you cannot afford to hire a lawyer, a lawyer will be appointed for you, without costs, Before questioning.

___5. If you wish to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time.

WAIVER

I have read the statement of my rights shown, and I understand what my rights are. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed _____

WITNESS: _____

WITNESS: _____

Revised 3/98
Form 43-92

Flager Co. Sheriffs Offc.

Statement of Miranda Rights

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. It you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Waiver of Rights

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

_____

Witnessed by:

_____

Officer's Name

_____

Officer's Department

Date: _____, 19_____

Time: _____M.

JAMES RIDER
SHERIFF
GLADES COUNTY SHERIFF'S OFFICE
MIRANDA WARNING

Name: _____

Date: _____

Officer: _____

Miranda Warning

1. You have the right to remain silent.

2. Anything you cay can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statement.

Waiver

After the warning and in order to secure a waiver, the following questions should be asked and a affirmative reply secured to each question.

1. Do you understand each of these rights I have explained to you?

   _____Yes _____No

2. Having these rights in mind do you wish to talk with us now?

   _____Yes _____No

_____ _____

Witness Signature Defendant's Signature

[SEAL]

HENDRY COUNTY SHERIFF'S OFFICE

ADVISEMENT OF MIRANDA RIGHTS

Person Interviewed: (LAST, First Middle)
Date of Birth:
Date of Interview:
Time of Interview – BEGIN:
Interviewer (1):
Complaint/Case Number:
☐ Adult ☐ Juvenile
Interviewer (2):
Offense Charged and/or Investigated:
Statute Number:

(Initial if understood)
▼

- YOU HAVE THE RIGHT TO REMAIN SILENT..... _____
- ANYTHING THAT YOU SAY CAN BE USED AGAINST YOU IN COURT..... _____
- YOU HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE WE ASK YOU ANY QUESTIONS AND TO HAVE HIM WITH YOU DURING QUESTIONING..... _____
- IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING..... _____

- **IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU WILL STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME UNTIL YOU TALK TO A LAWYER..... _____**

I, _____, have been advised of my Miranda Rights as stated above and completely understand each of my Miranda Rights solely because of my desire to freely and voluntarily cooperate and assist in this investigation. I have not been promised anything or been coerced in any way to give this statement. No inducement of any kind been held out to me in order for me to give this statement in this investigation.

I am not under the influence of any narcotic/drug (Illegal or legal), alcoholic beverage, and/or other substance, and fully understand the circumstances surrounding this investigation by the above-mentioned officer(s). I am also not under the care of any doctor or other person for psychological disorders and am in full control of my actions.

Signature - Person Interviewed: X_____

Signature/Printed Name - Interviewer (1):

_____

Signature/Printed Name - Interviewer (2):

_____

Time Signed: _____ Time interview - End: _____

HCSO FORM

HERNANDO COUNTY SHERIFF'S OFFICE
CASE NUMBER _____ DATE:_____

( ) WAIVER OF SEARCH

I hereby give my full consent that my _____ located at _____ may be searched by Sheriff's Deputies of Hernando County, Florida. I give this consent freely and voluntarily, without compulsion or threats of any kind. I fully understand my constitutional rights in regard to the search and it is my intention to fully and completely waive such rights.

I further agree that anything or article that may be found in the search of my _____ may be used in trial in any matter of which I stand accused.

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

( ) AFFIDAVIT OF STOLEN VEHICLE

I, the undersigned do hereby report the theft of my (year) _____ (make) _____ (model) _____ and (VIN) _____ on the ____ day of ____, at or about _____ AM/PM, and if you succeed in recovering the said vehicle and apprehending the person guilty of its theft, I do hereby bind myself to prosecute the said guilty person and to appear and testify against him in whatever court he may be tried I further agree to notify the Hernando County Sheriff's Office immediately upon the recovery of said vehicle by

any other law enforcement agency or otherwise, and I personally assume all responsibility for any consequences which may result from my failure to do so.

Signed this _____ day of _____.

_____

SIGNATURE

_____

ADDRESS

WITNESS: _____

WITNESS: _____

( ) **ON SITE VEHICLE RELEASE**

Instead of impoundment by the Hernando County Sheriff's Office, I, _____, do hereby give permission to leave/relinquish custody of my (year) _____ (make) _____ (model) _____ (tag) _____ (state) _____ that I have been operating at/or with (location/person) _____ (D/L#) _____. I am aware that the Hernando County Sheriff's Office will not be responsible for any cost, loss, or damage to this vehicle as a result of my decision.

_____

SIGNATURE

WITNESS: _____

WITNESS: _____

( ) **WAIVER OF PROSECUTION**

I, _____, do hereby authorize the Hernando County Sheriff's Office not to prosecute _____ regarding my complaint. I am satisfied with the manner in which the investigation was conducted. Also, I hereby release the Sheriff's Office of any responsibility regarding this complaint and request that any further investigations not be pursued

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

( ) **STATEMENT OF MIRANDA RIGHTS**

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to lawyer and have one present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statement.

( ) **WAIVER OF RIGHTS**

_____ I have read the above statement of my rights and I understand each of those rights and having these rights in mind. I waive them and willingly make a statement.

_____

SIGNATURE

WITNESS: _____

WITNESS: _____

( ) **DOMESTIC VIOLENCE PAMPHLET**

I have received a copy of the domestic violence pamphlet supplied by the Hernando County Sheriff's Office.

_____

SIGNATURE

WITNESS: _____

WITNESS: _____

HIGHLANDS COUNTY
SHERIFF'S DEPARTMENT

YOUR RIGHTS

SUBJECT: _____ PLACE: _____

INTERROGATING
OFFICER: _____ DATE: _____

TIME: _____

_____, before I ask you any questions I want to advise you of your Rights under the law. Do you understand that am a Police Officer? _____.

You have the Right to remain silent. Do you understand? _____.

Anything you say can be used against you in court. Do you understand? _____.

You have the Right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning if you wish. Do you understand? _____.

If you cannot afford to pay a lawyer, one will be appointed for you at no immediate charge, before any questioning if you wish. Do you Understand? _____.

If you decide to answer questions now without a lawyer present you will still have the Right to stop answering at any time. You also have the Right to stop

answering at any time until you talk to a lawyer. Do you understand? _____.

WAIVER OF RIGHTS: I, _____, have read/been read this statement or my Rights and I understand what my Rights are . I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threat have been made to me and no pressure of coercion of any kind has been used against me.

BY: _____

WITNESSES:

_____

_____

DATE: _____ TIME:_____

HOLMES COUNTY SHERIFF'S DEPARTMENT
211 N. OKLAHOMA ST.
BONIFAY, FLORIDA 32425

STATEMENT OF MIRANDA RIGHTS

1. You have the right to remain silent.

2. Anything you say can ad will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

_____

WAIVER OF RIGHTS

I have read the above statement of my rights and I understand each of these rights, and having these rights in mind, I waive them and willingly make a statement.

_____

Witnessed by: _____

Date: _____

Time form completed: _____

Complaint # _____

Jackson County Sheriff's Department

Name: _____ Place: _____

DOB/Age: _____ _____

Speak English? Yes__ No__ Date: _____

Read English? Yes__ No__ Time: _____

Highest Grade Completed _____ Officer's Name: _____

STATEMENT OF RIGHTS

Before you answer any questions or make any statement, you must fully understand your MIRANDA RIGHTS.

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to consult with a lawyer before you answer any questions or make any statement and to have him present during questioning.
- If you cannot afford a lawyer, one will be appointed for you before questioning or at anytime during questioning if you so desire.

- If you answer questions or make a statement without consulting a lawyer or without having a lawyer present, during questioning, you will still have the absolute right to stop answering questions or making any statement until you consult with a lawyer or have a lawyer present during further questioning.

ACKNOWLEDGMENT AND WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. I further wish to state that I have not previously requested any law enforcement officer to allow me to speak to a lawyer.

Signed _____

Witness: _____

Witness: _____

Time: _____

JEFFERSON COUNTY SHERIFF'S DEPARTMENT.
CONSENT AND RELEASE

Page _____ of _____
Date: _____
Report No.: _____

I, _____, the undersigned,

□ CONSENT TO BE INTERVIEWED

I, [int.] do hereby consent to being interviewed by_____ Concerning the offense of_____ I understand that I need not consent to being interviewed nor am I required to make any further statement whatsoever. That I have the right to remain silent and not answer any questions asked of me relative to this crime. I further understand that if I do make a statement or answer any questions that said statement, whether written or oral, could and will be used against me if I am prosecuted for this offense. I further understand that prior to or during this interview that I have the right to have an attorney present. I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate. I further understand that at any time that I desire I can have this interview stopped. Knowing my rights, I hereby, prior to being interviewed, waive my rights to consult with an attorney or to have one present during this interview. Any and all statements I will make will be freely and voluntarily made. No promises, threats or inducements of any kind or nature whatsoever have been promised me in order to consent to this interview.

Prior to my signature being affixed hereto, this statement has been read to me in its entirety and I fully understand the same.

☐ **CONSENT TO SEARCH/WAIVER OF SEARCH WARRANT**

I, [int.] hereby voluntarily give my full consent that the premises and/or building or enclosures located therein, and/or vehicle(s) located at _____ may be searched by an authorized Law Enforcement Officer. I give this consent freely and voluntarily, without compulsion, threat, or promise of any kind. I understand my constitutional right to refuse a search of said premises and/or vehicle(s) without a search warrant and it is my intention to fully and completely waive such right by this consent. I further understand that anything or any article that may be found in this search of the premises and/or vehicle(s) will be used at trial in any manner of which I may be accused.

☐ **FALSE OFFENSE/STOLEN VEHICLE REPORT**

I, [int.] certify that the statements made to _____ concerning the offense _____ were voluntarily made. I further certify that I am aware of the following statute and penalties as provided by 837.05, 775.082 and 775.083, to wit:

> Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable by a definite term of imprisonment not exceeding one year and/or a fine not exceeding $1,000.00.

I further agree to notify the **Jefferson County Sheriff's Department** immediately upon recovery of my property by myself or any other Law Enforcement Agency or any other person.

□ RELEASE OF RESPONSIBILITY

I, [int.] authorize officer(s) _____ of the **Jefferson County Sheriff's Department** to leave my vehicle _____ with/
Year Make Model Tag No.
parked at _____
Person/Location

I expressly release the above named officer(s) and the **Jefferson County Sheriff's Department** from any liability whatsoever due to damage; loss or theft of the above described vehicle.

□ COMPLAINT WITHDRAWAL AFFIDAVIT

I, [int.] certify that I am satisfied with the investigation conducted by the **Jefferson County Sheriff's Department** concerning the offense of _____, and I am hereby withdrawing my complaint. I understand a suspect in this case is _____ and I may secure an arrest warrant at a later date, if I so desire.

Signed this _____ day of _____, 19 ____, at _____ o'clock _____m.

Witnesses	Signature/Authority
	Deputy

CERTIFICATE OF MIRANDA WARNING AND WAIVER

I hereby declare: That I am an officer of the _____ Department, and that on _____, 19___, at ____ (a.m.) (p.m.), I interviewed _____ at _____.
(location)

and that prior to that interview, and before any questioning, I advised the person named above the following:

"1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you, before any questioning, if you wish one.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements."

That after informing the person named above of the foregoing, I asked him if he understood the rights that I had stated, to which he replied:

_____

_____

That I then asked him if, having in mind and understanding his rights, he was willing to talk to me, to which he replied: _____

_____

That the above answers were given freely and voluntarily, without the making of any threats or promises, and not under duress, pressure or coercion of any kind.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____ (a.m.) (p.m.) on _____ 19____.

_____
Signature of Officer

WAIVER OF RIGHTS

I have read the above statement of my rights and understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

_____
Signature

Witnessed by:

_____
Officer

_____
Department

GEORGE E. KNUPP, JR.
Sheriff

[Seal]

MARK BREWER
LEGAL ADVISOR

Lake County Sheriff's Office

Office (352) 343-9511
Fax (352) 343-9476
E-mail: mbrewer@lcso.org
Emergency 911

360 W. Ruby Street
Tavares, Florida 32778-3877

[SEAL]

Office of the Sheriff
Major Crimes Unit

Rodney Shoap
State of Florida
County of Lee

CASE NO : 01-253001
PLACE : LCSO
TIME : 6:52am.
DATE : 10/25/01
AGENT :

BEFORE I/WE ASK YOU ANY QUESTIONS CONCERNING AN ALLEGED L & L YOU MUST FULLY UNDERSTAND YOUR RIGHTS.

YOU HAVE THE RIGHT TO REMAIN SILENT. ab

ANYTHING YOU SAY CAN BE USED AS EVIDENCE AGAINST YOU I COURT. IF YOU WISH, YOU HAVE THE RIGHT TO CALL OR OBTAIN AN ATTORNEY AT THIS TIME AND ASK HIS ADVICE BEFORE SAYING ANYTHING, AND TO HAVE HIM WITH YOU DURING ANY QUESTIONING. ab

IF YOU WANT AN ATTORNEY AND CANNOT AFFORD TO HIRE ONE, THE COURT WILL APPOINT ONE FOR YOU AND YOU HAVE THE RIGHT TO THIS COURT APPOINTED ATTORNEY'S ADVICE BEFORE SAYING ANYTHING AND TO HAVE HIM PRESENT WITH YOU DURING ANY QUESTIONING. ab

IF YOU DECIDE TO ANSWER QUESTIONS NOW AND WAIVE YOUR RIGHTS TO FIRST TALK WITH AN ATTORNEY OR HAVE AN ATTORNEY PRESENT WITH YOU DURING QUESTIONING,

YOU WILL STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME UNTIL YOU TALK TO A LAWYER. ab

WAIVER OF RIGHTS

****

I HAVE CAREFULLY READ THE ABOVE STATEMENT AND I FULLY UNDERSTAND WHAT MY RIGHTS ARE. I DO NOT WANT AN ATTORNEY AT THIS TIME AND I AM WILLING TO MAKE A STATEMENT AND ANSWER ANY QUESTIONS CONCERNING THIS INVESTIGATION. I FULLY UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES, THREATS, OR INDUCEMENTS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME. ab

WITNESS: SIGNED:

WITNESS: _____

TIME : 6:56 AM _____

LCSO FORM NO

[SEAL] *Sheriff LARRY CAMPBELL*
Leon County Sheriff's Office

01-10521
Case #: 01-110462/01-118908
Date: 7/17/01
Time: 2/29 hrs.
Name:
Location: L.C.J.

WARNING OF CONSTITUTIONAL RIGHTS

Before we ask you any questions, you must understand your rights as set forth in the **Miranda** Court decision.

✓(1) You have the right to remain silent.

✓(2) Anything you say can and will be used against you in a court of law.

✓(3) You have the right to talk to a lawyer and have him present with you during questioning.

✓(4) If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish.

✓(5) You can decide at any time to exercise these rights and not answer any question or make any statement.

WAIVER OF CONSTITUTIONAL RIGHTS

I have been advised of my rights and I understand what my rights are. I am willing to make a statement and answer any questions. I understand and know what I am doing. No promise or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed

Witness: Date: 7/17/01

Witness: _____ Date: _____

STATEMENT

I, _____, make the following true and voluntary statement. I have been read my rights as set forth in the Miranda Warning and fully understand them. No threats, promises, or rewards have been offered to me, I was born on March 25, 1975, and have a (an) 12 th grade education. I can read and write the English language.

I stole checkbooks from [Redacted] I wrote and cashed numerous checks to various stores such as [Redacted] etc. The reason for my doing this was for me and my boyfriend to be able to have a place

(CONTINUE ON BACK IF NECESSARY)
FMI (11/99)

Sheriff [SEAL]

JOHNNY M. SMITH, JR. SHERIFF, LEVY COUNTY
MEMBER, FLORIDA SHERIFF'S ASSOCIATION
P.O. DRAWER 1719
BRONSON, FLORIDA 32621-1719
PHONE: (352) 486-5111
FAX: (352) 486-5116

MIRANDA RIGHTS WARNING

NAME: _____
DATE: _____
TIME: _____
CASE #: _____
DEFENDANT/
SUSPECT NAME: _____
ADDRESS: _____
CITY/STATE: _____
TELEPHONE: _____

(You are suspected of) (You are under arrest, charged with) having committed the crime of _____. Before we ask you any questions, you must know what your rights are.

1. You have the right to remain silent. You are not required to say anything or answer any questions. Anything you say can and will be used against you in court.

DO YOU UNDERSTAND THAT? ____
SIGNATURE: _____

2. You have the right to talk to a lawyer for advice before being questioned. You have the right to have him/her with you while being questioned.

If you cannot afford to hire a lawyer, one will be provided for you, without cost, by the Court.

DO YOU UNDERSTAND THAT? _____

SIGNATURE: _____

3. If you want to answer questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering questions at any time you want to talk with a lawyer.

DO YOU UNDERSTAND THAT? _____

SIGNATURE: _____

WAIVER

I have read or had read to me that statement of my rights stated above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time, although I understand that I can have one. No promises or threats have been made by anyone to cause me to make a statement. I have not been mistreated or harmed by anyone to cause me to make a statement.

(a) What is your age? _____ DOB? __/__/__
SS#? __/__/__ POB? ___ WGT? ___
HGT? ___ Eye? ___ Hair? ___
Defendant/Suspect

(b) DL#: _____ State: ___
How far did you go in school? _____

(c) Do you read, write, understand the English language? _____

(d) Do you understand the statement written above? _____

(e) Are you presently under the influence of alcohol, drugs or medications? _____

Under the inquiry as to this defendant's mental condition, age, education, experience, the nature or complexity of the case, and other factors, the following witnesses certify and attest to the signature of the Defendant above, before them, stating that no threats or coercion were made to Defendant to get him/her to execute the above, and that they have absolved the Defendant prior to his signature and believe his to be an intelligent, understanding and voluntary choice.

_____ _____

Witness Witness

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Liberty County Sheriff
P. O. Box 67
Bristol, Florida 32321

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC:lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

INTERROGATION * ADVICE OF RIGHTS

****

YOUR RIGHTS

PLACE _____

DATE _____

TIME _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her present with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

If you decide to answer questions now without, a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed: _____

Witness: _____

Witness: _____

Time: _____

MADISON COUNTY SHERIFF'S OFFICE

ADVICE OF RIGHTS

NAME _____ Place_____
D.O.B. _____ Date _____
SSN # _____ Time _____

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you without cost, before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am

doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. I have not previously advised a law enforcement officer that I would like to talk to a lawyer.

Signed _____

Witness: _____

Witness: _____

Time: _____

Case Number: _____

[SEAL] CHARLES B. WELLS Sheriff
MANATEE COUNTY, FLORIDA

515 11th Street West
Bradenton, FL 34205-7727
Telephone (941) 747-3011
Fax Numbers
Criminal Investigation Division (941) 748-5682
Administrative/Executive (941) 749-5401

CASE NUMBER: _____
DATE: _____ **TIME:** _____

WARNING OF CONSTITUTIONAL RIGHTS

1. You have the right to remain silent.

2. Anything you say may be used against you in a court of law.

3. You have the right to talk to an attorney and have him/her present with you while you are being questioned.

4. If you cannot afford to hire an attorney, one may be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

QUESTION: Do you understand each of these rights I have explained to you?

ANSWER: _____

QUESTION: Having these rights in mind, do you wish to talk to us now?

ANSWER: _____

_____

SIGNATURE OF PERSON BEING QUESTIONED

_____

OFFICER ADVISING RIGHTS

MCSO FM 87-065 (rev 7/97) An Accredited Agency

[SEAL]

SHERIFF - Marion County
WAIVER OF RIGHTS FORM

MCSO Case#: _____ Location:_____

Offense: _____ Date/Time:_____

YOUR RIGHTS

Before we ask you any questions you must fully understand your rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

WAIVER OF RIGHTS

Do you understand each of these rights I have explained to you? (Yes) _____

Having these rights in mind, do you wish to talk to us now? (Yes) _____

Signature _____

Printed Name _____

Deputy _____ ID# _____

Witness _____

MARTIN COUNTY SHERIFF'S OFFICE

INTERROGATION: ADVICE OF RIGHTS

YOUR RIGHTS

Place _____

Date _____

Time _____

Before we ask you any questions, you must understand your rights.

1. You have the right to remain silent.
2. Anything you say can be used against you in court.
3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
4. if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
5. if you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me

and no pressure or coercion of any kind has been used against me.

Signed _____

Witness _____

Witness _____

Time _____

OKALOOSA COUNTY
SHERIFF'S DEPARTMENT

YOUR RIGHTS

Place: _____
Date: _____
Time: _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me

and no pressure or coercion of any kind has been used against me.

Signed: _____

Witness: _____

Witness: _____

Time: _____

Okeechobee County Sheriff's Office

Miranda Warnings

_____ _____

Offense / Investigation Agency Case Number

I. **Questions that should be asked before administering Miranda warnings to anyone.**

A. What is your primary language? _____

B. What is the highest grade level of school you completed? _____

C. Are you under the influence of any prescription medication? _____

D. Are you under the influence of an alcoholic beverage now? _____

E. When was the last time you had any alcoholic beverages to drink? _____

F. Are you under the influence of an illegal narcotic now? _____

G. Are you presently receiving treatment by a Psychiatrist? _____

H. Are you taking medication prescribed to you that would cause you to experience hallucinations or delusions? _____

II. **Before you are asked any questions, the Constitution requires I inform you that:**

A. You have the right to remain silent. Do you understand that right?

Yes ___ No ___

B. Anything you say may be used as evidence against you in court. Do you understand?

Yes ___ No ___

C. You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning? Do you understand that right?

Yes ___ No ___

D. If you cannot afford to hire an attorney, the court will appoint one for you without cost. Do you understand?

Yes ___ No ___

E. If you decide to answer questions now, you have the right to stop answering at any time during questioning. Do you understand that right?

Yes ___ No ___

F. Knowing these rights, do you wish to talk with me / us at this time?

Yes ___ No ___

III. **This statement is signed of my own free will without any threats or promises having been made to me.**

_____

Signature Date/Time

_____

Advising Officer Date/Time

_____

Witness Date/Time

Orange County
Sheriff's Office

[Fold-out exhibit, see next page]

Orange County Sheriff's Office

Waivers & Affidavits

Name of Person Signing:	Date:	Case Number:
Type of Incident:	Deputy Name:	Date:

MIRANDA WARNING

The Constitution requires that I inform you that:

1. You have the right to remain silent.
2. Anything you say [illegible] used in court as evidence against you.
3. You are entitled to talk to an attorney now and have him present now or [illegible] time during questioning.
4. If you cannot afford an attorney one will be appointed for you without [illegible]
5. Do you desire to consult with an attorney before speaking to us during this interview? YES ☐ NO ☐
6. If at any time hereafter you wish to exercise your rights to an attorney present during questioning, do you understand this?
7. Has anyone, at any time, threatened, intimidated or promised you anything whatever to induce you to make a statement now?
   YES ☐ NO ☐
8. Do you understand these rights? YES ☐ NO ☐
9. Do you wish to talk to us at this time? YES ☐ NO ☐

CONSENT TO SEARCH

I, [illegible] consent and agree to allow Orange County Sheriff's Deputies and employees to search my _____, located at _____. I further consent and agree to allow Orange County Sheriff's Deputies and Employees to search all [illegible] and all buildings, structures and vehicles appurtenant [illegible] shall contain or be located therein.

My consent and agreement to search is freely given. I understand that I may refuse to allow Orange County Sheriff's Deputies and Employees to search my _____.

FORGED SIGNATURE AFFIDAVIT

_____, being duly sworn according to law deposes and says that _____ No. _____ purports to be signed by _____ on the _____ pays to _____ of _____ $_____ which _____ by his or her bank. S/he further states that s/he did not sign the signature which appears on said check _____ is not his/her signature nor did he/she authorize said signature to be made. The affiant further states that he/she never received any benefit from said check or any part thereof, and further states that he/she did not present this check for negotiation or payment.

MISSING PERSONS OR JUVENILE RUNAWAY AFFIDAVIT

I, [illegible] certify that _____ has been missing since _____.

I am the: ☐ Parent ☐ Family Member ☐ Legal Guardian ☐ Physician and/or other authoritative source of medical information

The above listed person is missing due to: ( ) Runaway ( ) Unknown circumstances ( ) Physical/mental disability ( ) In the company of another person under circumstances indicating physical danger ( ) Involuntary disappearance.

I give my permission to release dental records or any other medical records on the above missing person. I further agree to notify the Orange County Sheriff's Office immediately upon receiving any additional information concerning the above.

FALSE INFORMATION AFFIDAVIT

I, [illegible] certify that the statements made to the above listed Orange County Sheriff's Office Law Enforcement Official concerning the above listed incident/release were voluntarily made. I further certify that I am aware of the following statute and penalties as provided by Florida Statutes [illegible] and 777 to wit: Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of [illegible] manner of the first degree, punishable by a definite term of [illegible] not exceeding one year, or fine not exceeding [illegible]

VEHICLE LOSS OR DAMAGE RELEASE AFFIDAVIT

I, [illegible] give my permission in lieu of impounding by the Orange County Sheriff's Office for the

Year:	Make:	Model:
Body Style:	Color/Modification:	
VIN:	Tag:	State:

that [illegible] operating to ( ) remain [illegible] at the request of: _____ ( ) relative: _____. It was made [illegible] after Deputy listed above explained [illegible] of damage or loss [illegible] signature [illegible] hold [illegible] unless the [illegible] of Orange County [illegible] for damage or loss which may occur as a result [illegible]

[illegible]

I, [illegible] request not to pro[illegible] in regard to my complaint [illegible]

I do not desire further investigation to be conducted in this matter. I will not willingly testify, and I will hold free and absolve from any further duty in regard to the matter the Orange County Sheriff and all its employees.

Sworn to and subscribed before me this _____ day of _____, 19__, by _____

Notary Public ☐ [illegible] Law Enforcement Officer ☐

I swear and affirm [illegible] are correct and true

[illegible]

[illegible] - Records Copy - Sheriff's Copy - State Attorney Copy - Clerk Court - Defendant/Plaintiff Copy

-SAMPLE COPY-
-SAMPLE COPY-
-SAMPLE COPY-

04/05/02 FRI 17:19 FAX 561 688 3161 PBSO CENTRAL RECORDS 002

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING, IDENTIFY YOURSELF AND STATE:

"I am required to warn you before you make any statement that you have the following constitutional rights:

(1) You have the right to remain silent and not answer any questions.

(2) Any statement you make must be freely and voluntarily given.

(3) You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence and representation of a Court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

(6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

(7) Any statement can be and will be used against you in a court of law."

Signed: _____

Date _____ Time _____

PBSO [ ] P-1311

PASCO COUNTY SHERIFF'S OFFICE

MULTIPURPOSE FORM

DATE: _____ CASE #: _____

WAIVER OF SEARCH: I give the Pasco County Sheriff's Office consent to search my _____ located at _____, and any containers, compartments, or contents within. I give this consent without any force or threats of any kind. I understand that it is my constitutional right to refuse, and I waive such rights. I understand that any thing or article found in the search may be used against me.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____
WITNESS: _____

AFFIDAVIT OF STOLEN VEHICLE: My auto (year) ____ (make) ____ (model) ____ VIN _____was stolen on _____. I agree to assist in prosecuting any person arrested for this crime, including testifying in court. I will notify the Pasco County Sheriff's Office if my vehicle is located and understand the consequences that may result if I fail to do so.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____
WITNESS: _____

ON SITE VEHICLE RELEASE: I request that my (year) _____ (make) _____ (model) _____ (tag) _____ (state) _____ be left at (location) _____ or with

(name) _____ (DL#) _____. I am aware that the Pasco County Sheriff's Office will not be responsible for any cost, loss, or damage to my vehicle as a result of my decision. I understand that the sheriff's office may impound and tow my vehicle for security purposes, if necessary.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____
WITNESS: _____

WAIVER OF PROSECUTION: My complaint has been resolved to my satisfaction and I understand that the Pasco County Sheriff's Office will not make an arrest or refer criminal charges on _____ in this matter.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____
WITNESS: _____

STATEMENT OF MIRANDA RIGHTS: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights, and not answer any questions or make any statements.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____

WITNESS: _____

WAIVER OF RIGHTS: I have read the above statement of my rights and I understand each of these rights. Having these rights in mind, I freely and voluntarily waive them and willingly make a statement to _____.

PRINTED NAME: _____
SIGNATURE: _____
WITNESS: _____
WITNESS: _____

WAIVER OF ATTORNEY: I understand that I do not have to speak with anyone regarding any criminal activity without an attorney present, and if I do, anything I say can and will be used against me in a court of law. No threats or promises were made in an attempt to have me sign this document. Although I have ___ (initial) / have not ___ (initial) appointed or retained counsel, I now wish to speak without an attorney present.

PRINTED NAME: _____
WITNESS: _____

RIGHTS ADVISEMENT FORM

DATE _____ TIME _____

INVESTIGATOR _____

CLASSIFICATION/OFFENSE NUMBER _____

I am _____ of the Pinellas County Sheriff's Department. State your name, age, and address.

A. _____

Q. Do you understand that you have the right to remain silent?

A. _____

Q. Do you understand that anything you say can and will be used against you in a court of law?

A. _____

Q. Do you understand that you have the right to talk to a lawyer and have him present with you while you are being questioned?

A. _____

Q. Do you understand that if you cannot afford to hire a lawyer, one will be appointed to represent you, before questioning, if you wish?

A. _____

Q. Do you understand that you can decide at any time to exercise these rights and not answer any questions or make any statements?

A. _____

Q. Do you understand each of these rights I have just explained to you?

A. _____

Q. Having these rights in mind, do you wish to talk to us now?

A. _____

_____ _____

WITNESS SIGNATURE

_____

WITNESS

Sheriff [SEAL] TAYLOR DOUGLAS
Sheriff Putnam County

RIGHTS WAIVER FORM

Date: _____ Time: _____ Place: _____

My name is _____. I am _____ years old.

My address is _____

I have completed _____ years of schooling.

I know that _____ is a Deputy Sheriff with the Putnam County Sheriff's Office.

This Deputy Sheriff told me that:

Initial.

___ 1. have the right to remain silent.

___ 2. Anything I say can be used against me in a court of law.

___ 3. I have the right to talk to a lawyer and have him present with me while I am being questioned.

___ 4. If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish.

___ 5. I can decide at any time to exercise these rights and not answer any questions or make any statements.

I understand my rights. Having these in mind, I am willing to talk to this deputy sheriff. I have not been threatened. I have not been promised anything.

_____ _____

Deputy Sheriff Signature

Form D-8850

Santa Rosa County Sheriff's Office
Rights Form

Name: _____ Place: _____
_____

Date of Birth: _____ Date and Time: _____

Speak English? Yes ___ No ___
Read English? Y es ___ No ___
Highest Grade Completed ___

BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS:

1. You have the right to remain silent.

2. Anything you say can be used as evidence against you in court.

3. You have the right to have a lawyer present while be questioned.

4. If you cannot afford to hire a lawyer, a lawyer will be appointed for you, without costs, before questioning.

5. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time.

WAIVER:

I have read the statement of my rights shown above, an I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I

understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signature: _____

Date and Time: _____

Witness: _____ Witness: _____

SARASOTA COUNTY SHERIFF'S OFFICE

Case Number _____ Date _____
Zone _____ Grid _____

I, _____ the undersigned, do hereby:

YOUR RIGHTS

You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Signed this _____ day of _____, 19___ , at _____ o'clock, _____. m.

_____ _____
Witness/Deputy Signature

WAIVER OF PROSECUTION

Request the Sarasota Sheriff's Office not to prosecute _____ regarding my complaint. I am satisfied with the manner in which the investigation was conducted and release the Sheriff's Office of any responsibility regarding this complaint. I understand that I may secure an arrest warrant at a later date, if so desired.

Signed this _____ day of _____, 19___ , at _____ o'clock, _____. m.

_____ _____

Witness/Deputy Signature

RELEASE FROM LIABILITY

Give my permission in lieu of impounding by the Sarasota County Sheriff's Office for the _____ (Year) _____ (Make) _____ (Model) _____ (License) _____ (State) _____ (Year) that I have been operating to remain at/release to _____. This decision was made by me after the deputy listed below explained the possibility of damage or loss. Being aware of this by affixing my signature to the form, I release the Sheriff's Office of any and all responsibility for manage or loss which may occur to the above described vehicle.

Signed this _____ day of _____, 19___ , at _____ o'clock, _____. m.

_____ _____

Witness/Deputy Signature

CONSENT TO SEARCH/WAIVER OF SEARCH WARRANT

Give my full consent that the premises/vehicle described and/or located at _____ (Vehicle Year) _____ (Make) _____ (Model) _____ (License) _____ (State) _____ (Location) may be searched by any Sarasota County Sheriff's Office Deputy. This

consent extends to the main building and any enclosures found on the property. I further agree that anything or any article that may be found in the search of the premises/vehicle may be used at trial in any manner of which I may stand accused. I fully understand my Constitutional rights by this consent. I give this consent freely and voluntarily, without compulsion or threat of any kind.

Signed this _____ day of _____, 19___ , at _____ o'clock, _____. m.

_____ _____

Witness/Deputy Signature

WILLIAM F. BALKWILL, SHERIFF
SARASOTA COUNTY, FLORIDA

BONNIE RAE BRINSON, CRM
Records Custodian

P.O. BOX 4115 [SEAL]
SARASOTA, FL 34230
PHONE (941) 861-4149 / 861-5800
FAX (941) 861-4039
bbrinson@co.sarasota.fl.us
www.sarasotasheriff.org

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Seminole County Sheriff
1345 E. 28 Street
Sanford, Florida 38776

Dear Sirs :

Pursuant to Florida Statutes §119, public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC: lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

MIRANDA WARNING

The constitution requires I inform you that:

1) Your have the right to remain silent.
2) Anything you say will be used in court as evidence against you.
3) You are entitled to talk to an attorney now and have him present now or at any time during questioning.
4) If you cannot afford an attorney, one will be appointed for you without cost.
5) Do you desire to consult with an attorney first or to have one during this interview?
6) If, at any time hereafter, you wish to remain silent or have an attorney present, all questions will be stopped.
7) Has anyone, at any time threatened, coerced or promised you anything in order to induce you to make a statement now?
8) Do you understand these rights?
9) Do you wish to talk to us at this time?

HE LEIDO LO EXPUESTO ARRIBA ACERCA DE MIS DERECHOS, Y LO COMPRENDO PERFECTAMENTE.

DESEO CONTESTAR CUALQUIER PREGUNTA QUE SE ME HAGA.

NO DESEO LA PRESENCIA DE NINGUN ABOGADO EN ESTE MOMENTO.

PARA CONSTANCIA DE QUE NO SE ME HA AMENAZADO, NI SE ME HA HECHO NINGUN

OFRECIMIENTO, VOLUNTARIAMENTE FIRMO LA PRESENTE DECLARACION.

Testigo	Firma del sujeto
Testigo	Fecha y hora

I HEREBY KNOWINGLY AND VOLUNTARILY WAIVE MY CONSTITUTIONAL RIGHTS AS EXPLAINED TO ME.

_____

SIGNATURE DATE TIME

WITNESSED BY _____

INSTRUCTIONS TO OFFICER

IF THE PERSON INDICATES IN ANY MANNER, PRIOR TO OR DURING QUESTIONING THAT HE WISHES TO REMAIN SILENT, OR THAT HE WISHES AN ATTORNEY, THE INTERROGATION MUST CEASE, UNTIL PERMISSION IS GIVEN BY HIS ATTORNEY.

Advertencia de los Derechos Constitucionaies para un interrogatorio

ANTES DE QUE SE LE FORMULE NINGUNA PREGUNTA, UD. DEBE SABER SUS DERECHOS.

1. Ud. tiene el derecho de guardar silencio. Ud. no tiene la obligación de hablar conmigo ni dc contestar mis preguntas si no lo desea.

2. De hablar Ud. canmigo, cualquier cosa que Ud. diga puede ser presentada y será presentada en la corte como evidencia en contra suya.

3. Si Ud. desea que un abogado lo represente en este momento o en cualquier momento durante el interrogatorio tiem todo el derecho para, ello.

4. Si Ud. no puede pagar los servicios de un abogado, y sin embargo lo desea, podemos facilitarie uno sin costo alguno por parte suya.

FCN 100

G.O. 1.05
G.O. 35.02

ST. LUCIE COUNTY SHERIFF'S OFFICE
FT. PIERCE, FLORIDA

Case #

INCID. DATE _____
INCID. TIME _____

A. **MIRANDA WARNING**

I, _____, do hereby understand that (1), I have the right to remain silent. (2), Anything I say can and will be used against me in a court of law. (3), I have the right to talk to a lawyer and have him present with me while I am being questioned. (4), If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning if I wish. (5), I can decide at anytime to exercise these rights and not answer any questions or make any statements.

_____
Signature of person advising Miranda Warning

_____ _____
Date Time

Do you understand each of these rights explained to you? Yes __ No __ Signature _____

Having these rights in mind, do you wish to talk to us now? Yes __ No __ Signature _____

B. **CONSENT TO SEARCH**
SEARCH WARRANT WAIVER

I, _____, understanding my rights under Miranda, do hereby give my consent for the Sheriff of St. Lucie County, his deputies, or any person working at his direction to search the _____, currently under my control, specifically; _____ which is located at _____.

I understand that by giving my consent after Miranda for the above described _____ to be searched I am giving up any right to privacy for these areas. I also fully understand that if items are located in the area my consent is given for, then these items can be used against me in a court of law. I am giving my consent freely and voluntarily, without compulsion or threat of any kind.

Signed _____ Date _____

Authority _____
SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY,

THIS _____ DAY OF _____ 20 ____

_____
Law Enforcement Officer/Notary Public

C. **WAIVER OF PROSECUTION**

I, _____, do hereby request the ST. LUCIE COUNTY SHERIFF'S OFFICE not to prosecute _____ regarding my complaint of _____. I am satisfied with the manner in which the investigation was conducted and release the Sheriff's Office and/or State Attorney's Office of any responsibility regarding this complaint.

I request that any further investigation not be pursued.
Signature _____ Date _____ Time ____

D. **VEHICLE/VESSEL LOSS AND DAMAGE RELEASE**

I, _____, do hereby give my permission, (in lieu of impoundment/for the unlocking of) by the ST. LUCIE COUNTY SHERIFF'S OFFICE, for the:

YEAR ____ MAKE _____ MODEL _____
VIN _____ LICENSE _____ STATE _____ that I have been operating, (to remain at/be released to/or unlocked by) _____. This decision was made by me after the deputy explained the possibility of damage or loss. Being aware of this, affixing my signature to this form, I release the Sheriff's Office of any and all responsibility for damage or loss which may occur to the above described vehicle/vessel.

Signature _____ Date _____ Time _____

SUMTER COUNTY SHERIFF'S OFFICE

CASE # _____ DATE:_____

( ) WAIVER OF SEARCH

I hereby give my full consent that my _____ located at _____ may be searched by Sheriff of Sumter County, Florida. I give this consent freely and voluntarily, without compulsion or threats of any kind. I fully understand my constitutional rights in regard to the search and it is my intention to fully and completely waive such rights. I further agree that anything or article that may be found in the search of my _____ may be used in trial in any matter of which I stand accused.

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

( ) AFFIDAVIT OF STOLEN VEHICLE

I, the undersigned do hereby on report the theft of my of (year) _____ , (make) _____ (model) _____ and (VIN) _____, on the _____ day of _____ 20 __, at or about _____ AM/PM, and if and you succeed in recovering the said vehicle and apprehending the person guilty of its theft, I do hereby bind myself to prosecute the said guilty person and to appear and testify against him/her in whatever court he may be tried. I further agree to notify the Sumter County Sheriff's Office immediately upon the recovery

of said vehicle by any other law enforcement agency or otherwise, and I personally assume all responsibility for any consequences which mat result from my failure to do so. Signed this _____ day of _____ 20 ___.

_____
SIGNATURE

_____
ADDRESS

WITNESS: _____

WITNESS: _____

( ) **ON SITE VEHICLE RELEASE**

Instead of impoundment by the Sumter County Sheriff's Office, I, _____, do hereby give permission to leave/relinquish custody of my (year) _____ (make) _____ (model) _____ (tag) _____ (state) _____ that I have been operating, at/or with (location/person) _____ D/L # _____. I am aware that the Sumter County Sheriff's Office will not be responsible for any cost, loss, or damage to this vehicle as a result of my decision.

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

( ) **WAIVER OF PROSECUTION**

I, _____, do hereby authorize the Sumter County Sheriff's Office not to prosecute _____ regarding my complaint. I am satisfied with the manner in which the investigation was conducted. Also, I hereby release the Sheriff's Office of any responsibility regarding this complaint and I request that any further investigation not be pursued.

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

( ) **STATEMENT OF MIRANDA RIGHTS**

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have one present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statement.

( ) **WAIVER OF RIGHTS**

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind. I waive them and willingly make a statement.

_____

SIGNATURE

(TIME) _____

WITNESS: _____

WITNESS: _____

SUWANNEE COUNTY SHERIFF'S OFFICE
ALTON K. (AL) WILLIAMS, JR., SHERIFF
200 S. Ohio / MLK Avenue (Suwannee County Courthouse)
Live Oak, FL 32060
(904) 362-2222

YOUR CONSTITUTIONAL RIGHTS

BEFORE YOU MAKE ANY STATEMENTS YOU MUST FULLY UNDERSTAND YOUR RIGHTS.

1. You have the right to remain silent.

2. Anything you say or do can and will be used as evidence against you in a court of law.

3. You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning.

4. If you cannot afford to hire an attorney, the court will appoint one for you without cost, and you have the right to have this attorney present at any time during questioning.

5. If you decide to answer questions now, you have the right to stop answering at any time during questioning.

I HAVE READ, OR HAD READ TO ME, THE ABOVE STATEMENTS AND FULLY UNDERSTAND WHAT MY RIGHTS ARE.

(SIGNED) (DATE)

WAIVER OF RIGHTS

I have carefully read, or had read to me, the above statements. I fully understand what my rights are. Knowing these rights, I do not want an attorney present at this time. I am willing to make a statement and answer questions concerning this investigation. I fully understand and know what I am doing. No promises, threats, or inducements have been made to me. No pressure or coercion of any kind has been used against me. I understand that I may have an attorney appointed to represent me, however, I do not wish him/her to be present at this time, while I talk to you.

(SIGNED)	(DATE)
(WITNESS)	(DATE)
(LOCATION)	(TIME)

UNION COUNTY SHERIFF'S DEPARTMENT
WAIVER OF RIGHTS

_____
PRINT DEFENDANT'S NAME

ADDRESS: _____ PLACE: _____

CITY: _____ DATE: _____

PHONE: _____ TIME: _____

_____, you are under arrest charged with _____, before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything or answer any questions. Any thing that you say can and will be used against you in Court.

DO YOU UNDERSTAND THAT? _____

SIGNATURE: _____

You have the right to talk to a lawyer for advice before being questioned, and you have the right to have him with you while being questioned. If you cannot afford to hire a [....]

VOLUSIA COUNTY SHERIFF'S OFFICE
Advice of Rights
Adult [SEAL]

	1

INCIDENT NUMBER

Page 2 of ____ Pages

Incident Type 3	Name of Person Signing 4
Date / Time 3	Deputy / ID # 6

YOUR RIGHTS

Before we ask you any questions, you must understand your rights:

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

Do you desire to consult with a lawyer first or to have one during this interview?

If, at any time hereafter, you wish to remain silent or have a lawyer present, all questioning will be stopped.

Has anyone, at any time, threatened, coerced or promised you anything in order to persuade you to make a statement now?

Do you understand these rights?

Do you wish to talk to us at this time?

WAIVER OF RIGHTS

I HAVE READ AND UNDERSTAND THIS STATEMENT OF MY RIGHTS. I AM WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS AT THIS TIME. I DO NOT WISH TO TALK TO A LAWYER. I AM GIVING THIS STATEMENT FREELY AND VOLUNTARILY WITH MY RIGHTS IN MIND. THERE HAVE BEEN NO THREATS, PROMISES, PRESSURE OR COERCION OF ANY KIND TO PERSUADE ME TO GIVE THIS STATEMENT.

7 _____ 8 _____

Signed Witness

_____

Witness

VSO301-0696

WALTON COUNTY SHERIFF'S OFFICE

YOUR RIGHTS

Place: _____
Date: _____
Time: _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be held against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

Witness: _____

Witness: _____

Time: _____

2000 5/00 BW

DAVID F. HARVEY
SHERIFF
[SEAL]

"B"

YOUR CONSTITUTIONAL RIGHTS

NAME: _____

CASE NO.: _____

DATE: _____

TIME: _____

PLACE: _____

WARNING OF YOUR CONSTITUTIONAL RIGHTS

Before we ask you any questions, you must understand your Constitutional Rights as set forth in the MIRANDA Court decision:

1. You have the right to remain silent
2. Anything you say can and will be used against you in a Court of Law.
3 You have the right to a lawyer for advice before we ask you any questions, and to have a lawyer present with you during questioning.
4. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning, if you wish.
5. If you decide to answer questions at this time without a lawyer present, you will still have the

right to stop answering questions at any time until you talk to a lawyer.

Have you previously requested any law enforcement officer to allow you to speak to an attorney? _____

WAIVER OF CONSTITUTIONAL RIGHTS

I have read, or been read, the above statement of my Rights and I understand what my Rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promise or threats have been made to me, and no pressure or coercion of any kind have been used against me.

SIGNED: _____ WITNESS: _____

DATE: _____ WITNESS: _____

February 2000
[SEAL]
WAKULLA COUNTY
15 Oak Street
Crawfordville, FL 32327
(850) 926-0800
www.wcso.org

Washington County Sheriff's Department
P.O. Box 626
Chipley, Florida 32428

STATEMENT OF MIRANDA RIGHTS

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

_____

WAIVER OF RIGHTS

I Have read the above statement of my rights and I understand each of these rights, and having these rights in mind, I waive them and willingly make a statement.

_____

Witnessed by :

_____

Officer's Name

Date: _____ **19** _____

Time Form Completed: _____

BARTOW POLICE DEPARTMENT
CONSENT AND RELEASE

Page _____ of _____ Report No.: _____
Date: _____

I, _____, the undersigned

☐ **CONSENT TO BE INTERVIEWED CONCERNING AN OFFENSE OF _____**

[int.] You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

I, _____, have had these rights read to me; I understand them and I am willing to talk to you at this time.

☐ **CONSENT TO SEARCH/WAIVER OF SEARCH WARRANT**

I, [int.] hereby voluntarily give my full consent that the premises and/or building(s) or enclosure(s) located therein, and/or vehicle(s) located at _____ may be searched by an authorized law enforcement officer. I give this consent freely and voluntarily, without compulsion, threat, or promise of any kind. I understand my constitutional right to refuse a search of said premises and/or vehicle(s)

without a search warrant and it is my intention to fully and completely waive such right by this consent. I further understand that anything or any article that may be found in this search of the premises and/or vehicle(s) will be used at trial in any matter of which I may be accused.

☐ **MISSING PERSON/JUVENILE RUNAWAY AFFIDAVIT:**

I, [int.] certify that _____, DOB _____ has been missing since _____. I am the ☐ parent, ☐ legal guardian ☐ family member ☐ physician/and or authoritative source of the above described person; and he/she is missing due to:
☐ unknown circumstances ☐ in the company of another person under circumstances indicating physical danger, ☐ involuntary disappearance; ☐ physical or mental disability; ☐ runaway.

☐ **FALSE OFFENSE/STOLEN VEHICLE REPORT**

I, [int.] certify that the statements made to _____ concerning the offense of _____ were voluntarily made. I further certify that I am aware of the following statute and penalties as provided by 837.05, 775.082 and 775.083, to wit: Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable by a definite term of imprisonment not exceeding one year and/or a fine not exceeding $1,000.00.

I further agree to notify the Bartow Police Department immediately upon recovery of my property by myself or any other law enforcement agency or any other person.

☐ RELEASE OF RESPONSIBILITY

I, [int.] authorize officer(s) _____ City of Bartow Sheriff's Department, to leave my vehicle to wit: _____ with/parked
Year Make Model Tag No.
at _____
I expressly release the above named officer(s) and the City of Bartow from any liability whatsoever due to damage, loss or theft of the above described vehicle.

☐ COMPLAINT WITHDRAWAL AFFIDAVIT

I, [int.] certify that I am satisfied with the investigation conducted by the Bartow Police Department concerning the offense of _____ and I am hereby withdrawing my complaint. I understand a suspect in this case is _____ and I may request an arrest warrant at a later date, if I so desire.

Signed this _____ day of _____, 19 ___, at _____ o'clock _____m.

_____ _____
Witnesses Signature/Authority

_____ _____
Officer

Bradenton Police Department
Waiver of Rights

1. You have the right remain silent.

2. Anything you say can and will be used against you in a Court of law.

3. You have the right to talk to a lawyer and have him Present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be Appointed to represent you before any questioning, If you wish.

---

5. You can decide at any time to exercise these rights And not answer any questions or make any statements.

6. Do you understand each of these rights I have explained To you?

7. Having these rights in mind, do you wish to talk to us Now.

_____
SIGNATURE OF PERSON QUESTIONED

_____

_____
WITNESS

TOWN OF DAVIE
POLICE DEPARTMENT
1230 South Nob Hill Road
Davie, FL 33324
(954) 693-8200

YOUR RIGHTS

SUBJECT: _____ DATE/TIME: _____
INTERR.
OFFICER: _____ LOCATION: _____

_____, before I ask you any questions, I want to advise you of your rights under the law. Do you understand that I am a police officer?_____

1. You have the right to remain silent and refuse to answer questions. Do you understand? _____

2. Anything you say can be used against you in a court of law, or in any other judicial proceedings. Do you understand?_____

3. You have the right to consult with a lawyer before answering any questions, and to have him present while you are being questioned. Do you understand? _____

4. If you cannot afford a lawyer, a lawyer will be appointed for you, free of charge, if you so desire. We will not ask any questions until he has been appointed. Do you understand?_____

5. You can waive these rights, and answer questions now, without a lawyer present. However, you do

have the right to stop answering at any time, or until you are able to consult a lawyer. Do you understand? _____

6. Knowing and understanding these rights, are you willing to answer questions without a lawyer being present? _____

7. Should you talk to me, anything you might answer to my questions will be introduced in evidence in a court of law against you. Do you understand? _____

Signed: _____

I, _____, have read this statement of my rights, or have had it read to me, and I understand what my rights are. I am willing to make a statement and answer questions. I do not wish an attorney/lawyer at this time. No threats or promises have been made to me. No pressure of any kind has been used against me, nor have I been tricked or fooled into giving this statement. I understand and know what I am doing. This statement will be used in a court of law against me.

SIGNED: _____

WITNESS: _____ DATE: _____

WITNESS: _____ DATE: _____

COCONUT CREEK PUBLIC SAFETY DEPT.

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING. IDENTIFY YOURSELF AND STATE:

"I am required to warn you before you make any statement that you have the following constitutional rights:

(1) You have the right to remain silent and not answer any questions.

(2) Any statement you make must be freely and voluntarily given.

(3) You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence and representation of a Court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

(6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

(7) Any statement can be and will be used against you in a court of law"

Date _____Time _____

Witnesses _____

FORT MYERS POLICE DEPARTMENT

DETECTIVE BUREAU

SUBJECT DESCRIPTION SHEET AND MIRANDA RIGHTS

Before we ask you any questions, you must understand your rights. You have the right to remain silent; anything you say can be used against you in court. You have the right to talk to a lawyer for advice during questioning. You have this right to the advice and presence of a lawyer, even if you cannot afford to hire one, one will be appointed for you, if you wish, before any questioning. If you wish to answer questions now without a lawyer present, you still have the right to stop answering at any time. We wish to talk to you about:

_____.

WAIVER OF MIRANDA RIGHTS

I have ***read/had*** read to me the statement of my rights shown above. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

SIGNATURE: _____ C.R.#: _____

WITNESS: _____

Pre-Arrest: _____

DATE/TIME: _____ Post-Arrest: _____

1. *NAME*: _____ 2. *NICKNAME*: _____

3. *SEX*: Male/Female
4. *RACE*: Black/White/Oriental 5: *DOB/AGE*:___
6. *ADDRESS*:_____ 7. *CITY/STATE*:_____
8. *HOME PHONE*:_____
9. *WORK PHONE*:_____
10. *HEIGHT*:_____ 11. *WEIGHT*:_____
12. *COLOR HAIR*:_____ 13. *EYE COLOR*:_____
14. *GLASSES/CONTACTS*: YES or NO
15. *BUILD*: Slender Medium Muscular Heavy
16. *COMPLEXION*: Fair Medium Tan/Dark Ruddy Freckled
17. *SPEECH*: Normal Impediment Accent _____ Other: _____
18. *EMOTIONAL STATE*: Calm/Angry/Excited/ Nervous/Stupor/Polite/ Irrational/Other
19. *SOBRIETY*: Sober Had been drinking Intoxicated

INTERVIEW LOCATION:_____
STATEMENT: TAPED/ORAL
Persons present during interview:

1) _____
2) _____
3) _____

CITY OF FORT PIERCE
POLICE DEPARTMENT

MIRANDA WARNING

YOUR RIGHTS

Place:_____

Date:_____

Time:_____

BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to an attorney for advice before we ask you any questions, and to have him with you during questioning.

If you cannot afford an attorney, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now, without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not

want an attorney at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed_____

Witnesses by:

_____

_____

Date:_____ Time:_____

GAINESVILLE POLICE DEPARTMENT
RIGHTS WAIVER FORM

SUBJECT'S NAME (PRINT):_____

DATE OF INTERVIEW:_____

TIME OF INTERVIEW:_____

CASE REPORT NUMBER:_____

SUBJECT'S ADDRESS:_____

CITY:_____

STATE:_____ ZIP CODE:_____

SUBJECT'S TELEPHONE NUMBER:_____

LOCATION OF INTERVIEW:_____

YOU ARE BEING QUESTIONED REGARDING A CRIMINAL INVESTIGATION. BEFORE YOU ARE ASKED ANY QUESTIONS REFERENCE THE INVESTIGATION, YOU MUST UNDERSTAND WHAT YOUR RIGHTS ARE. YOU HAVE THE RIGHT TO REMAIN SILENT. YOU ARE NOT REQUIRED TO SAY ANYTHING OR ANSWER ANY QUESTIONS. ANYTHING THAT YOU SAY, CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.

DO YOU UNDERSTAND THAT?_____
SIGNATURE:_____

YOU HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE BEING QUESTIONED, AND YOU HAVE THE RIGHT TO HAVE HIM / HER WITH YOU WHILE BEING QUESTIONED. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE PROVIDED FOR YOU.

DO YOU UNDERSTAND THAT?_____
SIGNATURE:_____

IF YOU WANT TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME YOU WANT TO TALK TO A LAWYER.

DO YOU UNDERSTAND THAT?_____
SIGNATURE:_____

WAIVER

I HAVE READ OR HAD READ TO ME THE STATEMENTS OF MY RIGHTS AS STATED ABOVE. I UNDERSTAND WHAT MY RIGHTS ARE. I AM WILLING TO ANSWER QUESTIONS AND MAKE A STATEMENT. I DO NOT WANT A LAWYER AT THIS TIME, ALTHOUGH I UNDERSTAND THAT I CAN HAVE ONE. NO PROMISES OR THREATS HAVE BEEN MADE BY ANYONE TO CAUSE ME TO MAKE A STATEMENT. I HAVE NOT BEEN MISTREATED OR HARMED BY ANYONE TO CAUSE ME TO MAKE A STATEMENT.

1. WHAT IS YOUR AGE? _____ DOB: _____
   POB: _____

2. HOW FAR DID YOU GO IN SCHOOL? _____

3. DO YOU UNDERSTAND THE STATEMENTS WRITTEN ABOVE? _____

4. ARE YOU PRESENTLY UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR MEDICATION? _____

_____ _____

DATE SUBJECT'S SIGNATURE

THE FOLLOWING WITNESSES CERTIFY AND ATTEST TO THE SIGNATURE OF THE SUBJECT ABOVE, BEFORE THEM, STATING THAT NO THREATS OR COERCION WERE MADE TO THE SUBJECT TO GET HIM / HER TO EXECUTE THE ABOVE.

_____

OFFICER ADMINISTERING RIGHTS (SIGNATURE) / DATE

_____

WITNESS (SIGNATURE) / DATE

GPO Form 66 (Revised 9/00)

HIALEAH POLICE DEPARTMENT

YOUR RIGHTS

NAME: _____ CASE NO.: _____

DATE: _____ TIME: _____

PLACE: _____

Before we ask you any questions, you must understand your rights.

- You have the right to remain silent.
- Anything you say can and will be used against you in court.
- You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
- If you cannot afford a lawyer, one will be appointed for you before any questioning if you so desire.
- If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time, or until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a

lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed: _____

Officer: _____

Date: _____ Time: _____

Respect
Integrity
Fairness

KEY WEST POLICE
Gordon "Buz" Dillon
Chief of Police

Ronald J. Cacciatore
Worldwide Investigations, Inc.
750 S.W. Third Ave., Suite 201
Fort Lauderdale, FL 33316

April 5, 2002

Dear Mr. Cacciatore:

Per your request, I have enclosed a copy of the Miranda Warning form that is widely used by our officers. If I can be of any further to you in this or other matters, please contact me at your convenience.

Sincerely,

/s/
Sgt. Alan Newby, Commander
Bureau of Professional Standards

CC: File

[seal]

P.O. Box 1409, Key West, FL 33041-1409
(305) 294-2511 Internet: www.keywestcity.com

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHT'S

Place _____

Date _____

Time _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me

and no pressure or coercion of any kind has been used against me.

Signed_____

Witness:_____

Witness:_____

Time:_____

LAUDERHILL POLICE DEPARTMENT

Waivers and Affidavits

Name of person Signing:_____
Zone:_____ Case Number:_____
Type of Incident:_____
Name:_____ Date:_____

MIRANDA WARNING

The constitution requires that I inform you that:

1. You have the right to remain silent.
2. Anything you say will be used in court as evidence against you.
3. You are entitled to talk to an attorney now and have him present now or at any time during questioning.
4. If you cannot afford an attorney, one will be appointed for you without cost.
5. Do you desire to consult with an attorney first or to have one during this interview?
   Yes - ☐ **No** - ☐
6. If, at any time hereafter, you wish to remain silent or have an attorney present, all questioning will be stopped.
7. Has anyone, at any time, threatened, coerced or promised you anything in order to induce you to make a statement now? **Yes** - ☐ **No** - ☐
8. Do you understand these rights?
   Yes - ☐ **No** - ☐
9. Do you wish to talk to us at this time?
   Yes - ☐ **No** - ☐

CONSENT TO SEARCH

I, [Initial:] consent and agree to allow City of Lauderhill Police Department and employees to search my_____, located at _____. I further consent and agree to allow City of Lauderhill Police Department and employees to search all areas located in my _____, and all buildings, structures and vehicles adjacent to my _____, including all containers located therein. My consent and agreement to search is freely and voluntarily given. I understand that I may refuse to allow City of Lauderhill Police Department and employees to search my.

FORGED SIGNATURE AFFIDAVIT

_____, being duly sworn according to law deposes and says that _____ No. _____ purported to be signed by _____, drawn on the _____ dated _____, payable to the order of _____, the sum of $ _____ was not _____, by him/her or with his/her knowledge and consent. Said affiant further states that any signature which appears on said check as _____ is not his/her signature nor did he/she authorize said signature to be made. The affiant further states that he/she never received any benefit form said check or any part thereof, and further states that he/she did not present this check for negotiation or payment.

Sworn to and subscribed before me, the undersigned authority, This _____ Day of _____, 19__

_____

Notary Public - ☐ Law Enforcement Officer - ☐

I swear and affirm the above statement are correct and true.

_____

Signature

[SEAL]

MARGATE POLICE DEPARTMENT

WAIVER OF RIGHTS

1. You have the right to remain silent and refuse to answer questions.

   Do you understand? **(Initial)** ____ ____
   YES NO

2. Anything you do say can and will be used against you in a court of law.

   Do you understand? **(Initial)** ____ ____
   YES NO

3. You have the right to speak to an attorney before speaking to the police and to have an attorney present during questioning now or in the future.

   Do you understand? **(Initial)** ____ ____
   YES NO

4. If you cannot afford an attorney, one will be appointed for you before any questioning if you wish.

   Do you understand? **(Initial)** ____ ____
   YES NO

5. If you decide to answer questions now without an attorney present you will still have the right to stop answering at any time and speak to an attorney.

Do you understand? **(Initial)** ____ ____
YES NO

6. **Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present?**

Do you understand? **(Initial)** ____ ____
YES NO

_____
Signature of Accused

_____
Signature of Advising Officer

_____ _____ _____
Witness Date Time

_____ _____
Witness Case Number

[93MG0021]

REV. 9/96

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Melbourne Police Department
650 Apollo Boulevard
Melbourne, Florida 32935

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC: lw
Enclosure
4-8-02

[handwritten] Please see attached, per your request.

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

MIRANDA RIGHTS
WAIVER FORM

NAME OF PERSON INTERVIEWED_____

DATE OF BIRTH __/__/__ RACE ___ SEX ____

HOME ADDRESS_____

EXTENT OF EDUCATION_____

PLACE OF INTERVIEW_____

DATE & TIME INTERVIEW BEGAN_____

ENDED_____

PERSONS PRESENT DURING INTERVIEW_____

THE FOLLOWING MUST BE READ IN FULL BY THE INTERVIEWING OFFICER TO THE PERSON INTERVIEWED AND THE ANSWERS GIVEN BY THAT PERSON MUST BE WRITTEN DOWN EXACTLY, REGARDLESS OF WHAT THE ANSWERS MAY BE.

1. You are (under arrest for) (being interviewed in connection with) _____ Do you understand that? _____

2. You have a right to remain silent, You do not have to make any statements. You do no have to answer any questions. Do you understand this? _____

3. Anything you do say car. and will be used against you in court, do you understand this? _____

4. You have a right not to answer any particular question and you may stop the interview at any time. Do you understand this? _____

5. You have a right to consult with a lawyer now and at any time during this interview, if you can not afford a lawyer, one will be provider for you, without cost to you at any time. Do you understand this? _____

6. Do you want a lawyer present now? _____

7. Knowing these rights, are you willing to make a statement or answer questions without a lawyer being present? _____

8. Have any threats or promised of any kind been made to you so that you will give us a statement? _____

I certify that the above items (1) through (8) were read to _____ by me and the answers recorded above are those given by _____

I have read or have had read to me everything on this miranda rights sheet interview sheet) and it is true and correct.

_____
PERSON INTERVIEWED

_____
OTHER PERSON PRESENT

OCALA POLICE DEPARTMENT
P.0. BOX 1270, OCALA, FLORIDA 34478

WAIVER OF RIGHTS

DATE __/__/__ TIME _____ HRS.
CASE NO. 0- - -_____.

I, _____, am _____ year old. My date of birth is __/__/__. I have completed _____ years of school.

I live at _____, _____, _____.
(Street , Apt. number) (city) (State)

The person whom I give the following waiver of rights to is _____, having identified and made himself known to me as a Police Officer working for the Ocala Police Department, and the officer who advised me, and I know:

1. That I have the right to remain silent _____.

2. That anything I say can and will be used against me in a court of law _____.

3. That I have the right to talk to a lawyer and to have him present with me while I am being questioned _____.

4. That if I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning without cost if I wish _____.

5. That I can decide at any time to exercise these rights and not answer any questions or make any statements _____.

A. I understand each of the above rights that have been explained to me and are initialed by me _____.

B. Having these rights in mind, I wish to talk to Law Enforcement. **Yes No**
(Circle above)

_____
SIGNATURE

WITNESS: _____

_____

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING, IDENTIFY YOURSELF AND STATE: *"I am required to warn you before you make any statement that you have the following constitutional rights:*

(1) You have the right to remain silent and not answer any questions.

(2) Any statement you make must be freely and voluntarily given.

(3) You have the right to the presence of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence of a court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

(6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

(7) Any statement can be and will be used against you in a court of law.

THE VILLAGE OF NORTH PALM BEACH
PUBLIC SAFETY DEPARTMENT

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING, IDENTIFY YOURSELF AND STATE: "I am required to warn you before you make any statement that you have the following constitutional rights.

(1) You have the right to remain silent and not answer any questions.
(2) Any statement you make must be freely and voluntarily given.
(3) You have the right to presence of a lawyer of your choice before you make any statement and during any questioning.

PBPO 50

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Palm Beach Police Department
345 S. County Road
Palm Beach, Florida 33480

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC: lw
Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Palm Beach Gardens Police Department
10500 N. Military Trail
Palm Beach Gardens, Florida 33410

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC : lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

GIVE THIS WARNING TO ANY SUSPECT PRIOR TO ANY QUESTIONING. IDENTIFY YOURSELF AND STATE:

"I am required to warn you before you make any statement that you have the following constitutional rights:

(1) You have the right to remain silent and not answer any questions.

(2) Any statement you make must be freely and voluntarily given.

(3) You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence and representation of a Court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

(6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

(7) Any statement can and will be used against you in a court of law.

CITY OF PALM BEACH GARDENS, FLORIDA

[handwritten note: This is all we have and the defendant signs on the bottom of this card where I marked in red.]

WAIVER

After the warning, ask the following questions and secure an affirmative answer to each to obtain a waiver.

(1) Do you understand each of these rights I have explained to you?

(2) With these rights in mind, do you wish to talk to us now?

Ask defendant to sign card.

IMPLIED CONSENT

After the defendant has been lawfully arrested, read the following statements to him:

(1) I am now offering to give you an approved chemical test of your breath for the purpose of determining the alcoholic content of your blood.

(2) If you refuse to take this chemical test, your privilege of operating a motor vehicle will be suspended for a period of one year.

Be certain the defendant understands the statements. Remember, in order to uphold the suspension, you must prove: (1) You had reasonable cause to believe the defendant was driving while under the influence of an alcoholic beverage; (2) The defendant was lawfully arrested; (3) The defendant refused to submit to a chemical test; and (4) The defendant was warned, and he understood, that his driving privilege would be suspended for one year if he refused to submit to the test.

Ask defendant to sign card.

X_____

CITY OF PALM BEACH GARDENS, FLORIDA

PENSACOLA POLICE DEPARTMENT

RIGHTS FORM

Name: _____ Complaint #: _____

Age: _____ Location:_____

Date: _____

Time: _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in Court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you free of charge before any questioning, if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been used against me.

Signed: _____

Witness: _____

Witness: _____

PLANTATION POLICE DEPARTMENT

Warning of Rights of Person in Police Custody Before Interrogation Begins.

THE FOLLOWING WARNINGS MUST BE GIVEN TO THE SUBJECT BEFORE THE INTERROGATION BEGINS:

1. "You have the right to remain silent and refuse to answer questions" Do you understand? Subject replied _____.

2. "Anything you do say will be used against you in a court of law." Do you understand? Subject replied _____.

3. "You have the right to consult an attorney before speaking to the police and to have an attorney present during any questioning now or in the future." Do you understand? Subject replied _____.

4 "If you cannot afford an attorney, one will be provided for you without cost." Do you understand? Subject replied _____.

5. "If you decide to answer questions now without an attorney present you will still have the right to stop answering at any time until you talk to an attorney." Do you understand? Subject replied _____.

6. "Have you previously requested any law enforcement officer to allow you to speak to an attorney?" Subject replied _____.

7. "Now that I have advised you of your rights, are you willing to answer questions without an attorney present?" Subject replied _____.

_____
Subject Signature

Witness _____

Witness _____

Date _____ Time _____ Place _____

DIRECTIONS TO POLICE OFFICER:

A. If the subject indicates that he does not understand any portion of the instructions, they may be explained to him further in substantially similar language.

B. If the subject does not understand English, the statement and any explanations shall be given in whatever language he does speak or understand.

C. If the subject states he wants an attorney, he may not be interrogated until an attorney is present. If the subject states he wishes to remain silent and make no statement, he must not be interrogated. If the subject is talking to the police and then indicates his desire to stop, the interrogation must cease and he must not be interrogated further.

D. If the person in custody indicates he has an attorney and wants to consult with him, the officer conducting the interrogation shall ascertain the identity of such attorney and make every reasonable effort to contact him.

E. Custodial interrogation means questioning begun by police or law enforcement officers after a person has been taken into custody, or otherwise deprived of his freedom of action in any significant way.

CITY OF SANFORD, FLORIDA

POLICE DEPARTMENT
815 S. FRENCH AVE.
SANFORD, FL 32771

CONSTITUTIONAL RIGHTS

Case Number: _____ Date: _____ Time: _____

Name: _____ Date of Birth: _____

Address: _____, City: _____, State: _____

Before we ask you any questions you must understand your rights. After you have read each question, indicate your answer by writing your initials next to your response.

DO YOU UNDERSTAND

The Constitution requires I inform you that:

	YES	NO
1. You have the right to remain silent.	___	___
2. Anything you say can and will be used against you in a court of law.	___	___
3. You are entitled to talk to an attorney now or have one present now or at any time during questioning.	___	___
4. If, at any time hereafter, you wish to remain silent or have an attorney present, all questions will be stopped.	___	___

5. If you can not afford an attorney, one will be appointed for you without cost. ___ ___

6. Has anyone, at any time, threatened, coerced, or promised you anything in order to induce you to make a statement at this time? ___ ___

7. Do you understand these rights? ___ ___

8. Do you wish to talk to us at this time? ___ ___

9. (If a juvenile) you are entitled to have your parents present during this interview. ___ ___

_____
Signature

Officer: _____ Date: _____

I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promises have been made to me and no pressure of any kind has been used against me.

_____
Signature

Officer: _____ Date: _____

City of Sarasota
SARASOTA POLICE DEPARTMENT
2050 Ringling Blvd.
Post Office Box 3528
Sarasota, FL 34230

CAPTAIN JAMES E. SCHULTZ (914) 954-7027
Support Services Division Fax: 364-7357

April 11, 2002

Mr. Ronald J. Cacciatore
Worldwide Investigations, Inc.
750 S.E. Third Avenue, Suite 201
Fort Lauderdale, FL 33316

Dear Mr. Cacciatore:

I am in receipt of your public records request dated April 2, 2002. Attached is a current Waiver of Rights form that is currently used by the Sarasota Police Department.

Because of the urgency of your request, I will fax a copy of this form and send an original in the self addressed stamped envelope that you included with your letter.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

/s/James E. Schultz
Captain James E. Schultz
Support Services Division

JES/cp

Attachment: Waiver of Rights form

WAIVER OF RIGHTS

DATE_____ CASE #_____

On above date Detective _____, has explained my Miranda Rights to me.

I understand that I have the right to remain silent.

I understand that anything I say can be used against me in a court of law.

I understand that I have the right to talk to an attorney and have him present with me while I am being questioned.

I understand that if I want an attorney and cannot afford one, that an attorney will be appointed to represent me, free of charge, before any questioning.

I understand that I can decide at any time to exercise these rights and not answer any questions, or make any statements.

Understanding these rights explained to me I wish to make a statement at this time.

SIGNED: _____

WITNESS: _____

WITNESS: _____

_____
NOTARY PUBLIC
STATE OF FLORIDA AT LARGE

TRUE COPY
POLICE DEPARTMENT
RECORDS AND IDENTIFICATION
ST. PETERSBURG, FL 33705
DATE: 11 APR 02
AGENT: B. WILSON

RIGHTS ADVISEMENT FORM

OFFENSE # _____

Name: _____ DOB: _____ /AGE _____

Address: _____

Are you under the influence of prescription drugs _____ alcohol _____ Illegal drugs _____
If yes, what? _____

Education, Last Grade Completed: _____
Can you: read _____ write _____ hear _____

Date: _____ Time: _____

I am _____ of the St. Petersburg Police Department.

Q. Do you understand that you have the right to remain silent?

A.

Q. Do you understand that anything you say can and will be used against you in a court of law?

A.

Q. Do you understand that you have the right to have an attorney present while you are being questioned?

A.

Q. Do you understand that if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning, if you wish?

A.

Q. Do you understand that you can decide at any time to exercise these rights and not answer any questions or make any statements?

A.

Q. Do you understand the rights I have just explained to you?

A.

Q. Having these rights in mind, do you wish to talk to us now?

A.

Interviewee Signature: _____

Investigator Signature: _____

Witness Signature: _____

B051 (rev 5-99)

POLICE DEPARTMENT

STUART, FLORIDA

INTERROGATION: ADVICE OF RIGHTS

YOUR RIGHTS

Place_____

Date _____

Time_____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed_____

Witness: _____

Witness: _____

Time: _____

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

Tallahassee Police Department
234 East 7 Avenue
Tallahassee, Florida 32303

Dear Sirs:

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC : lw

Enclosure

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

NAME: _____

ADDRESS: _____

PLACE: _____

DATE: ____TIME: _____

CASE NUMBER: _____

STATEMENT OF RIGHTS

Before you answer any question or make any statement, you must fully understand your rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statement.

_____

NAME OF OFFICER

ACKNOWLEDGMENT OF RIGHTS

1. Do you understand each of these rights I have explained to you?

2. Have you previously requested any law enforcement officer to allow you to speak to an attorney?

3. Having these rights in mind, do you wish to talk to us now?

_____
SIGNATURE

WITNESS: _____

WITNESS: _____

DATE/TIME: _____

PD130 REV 3/90

TAMPA POLICE DEPARTMENT
CONSENT AND RELEASE

Page _____ of _____ Report No.: _____
Date: _____

I, _____, the undersigned

☐ **CONSENT TO BE INTERVIEWED CONCERNING AN OFFENSE OF _____**

[int.] You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

I, _____, have had these rights read to me; I understand them and I am willing to talk to you at this time.

☐ **CONSENT TO SEARCH/WAIVER OF SEARCH WARRANT**

I, [int.] hereby voluntarily give my full consent that the premises and/or building(s) or enclosure(s) located therein, and/or vehicle(s) located at _____ may be searched by an authorized law enforcement officer. I give this consent freely and voluntarily, without compulsion, threat, or promise of any kind. I understand my constitutional right to refuse a search of said premises and/or vehicle(s)

without a search warrant and it is my intention to fully and completely waive such right by this consent. I further understand that anything or any article that may be found in this search of the premises and/or vehicle(s) will be used at trial in any matter of which I may be accused.

☐ **MISSING PERSON/JUVENILE RUNAWAY AFFIDAVIT:**

I, [int.] certify that _____, DOB _____ has been missing since _____. I am the ☐ parent, ☐ legal guardian ☐ family member ☐ physician/and or authoritative source of the above described person; and he/she is missing due to:
☐ unknown circumstances ☐ in the company of another person under circumstances indicating physical danger, ☐ involuntary disappearance; ☐ physical or mental disability; ☐ runaway.

☐ **FALSE OFFENSE/STOLEN VEHICLE REPORT**

I, [int.] certify that the statements made to _____ concerning the offense of _____ were voluntarily made. I further certify that I am aware of the following statute and penalties as provided by 837.05, 775.082 and 775.083, to wit: **Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable by a definite term of imprisonment not exceeding one year and/or a fine not exceeding $1,000.00.**

I further agree to notify the Tampa Police Department immediately upon recovery of my property by myself or any other law enforcement agency or any other person.

☐ RELEASE OF RESPONSIBILITY

I, [int.] authorize officer(s) _____ City of Tampa Police Department, to leave my vehicle to wit: _____ with/parked
Year Make Model Tag No.
at _____
I expressly release the above named officer(s) and the City of Tampa from any liability whatsoever due to damage, loss or theft of the above described vehicle.

☐ COMPLAINT WITHDRAWAL AFFIDAVIT

I, [int.] certify that I am satisfied with the investigation conducted by the Tampa Police Department concerning the offense of _____ and I am hereby withdrawing my complaint. I understand a suspect in this case is _____ and I may request an arrest warrant at a later date, if I so desire.

Signed this ____ day of _____, 19 ____, at ____ o'clock _____m.

_____ _____
Witnesses Signature/Authority

_____ _____
Officer

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place_____

Date _____

Time_____

CCR#_____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a

lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Name _____ Address _____

Telephone No. _____Age ____ Occupation _____

Statement Made At _____ Hour ___ Date _____

STATEMENT MADE BY ABOVE NAMED PERSON

_____

_____

_____

SWORN TO and subscribed before me, the undersigned authority, this __ day of ___, 19___

_____

Notary Public

I have made this statement of my own free will and accord.

I swear the above statement is correct and true to the best of my knowledge and belief.

_____

Affiants Signature

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING. IDENTIFY YOURSELF AND STATE:

I am required to warn you before you make any statement that you have the following constitutional rights:

(1) You have the right to remain silent and not answer any questions.

(2) Any statement you make must be freely and voluntarily given.

(3) You have the right to the presence of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence of a Court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent

(6) I can make no threats or promises to induce you to make statement. This must be of your own free will.

(7) Any statement can be and will be used against you in a court of law.

(8) Do you understand each of these rights?
Yes _____ No_____

(9) Having these rights in mind, do you wish to speak to me now?
Yes _____ No_____

_____ _____ _____
Witness Date Time

VERO BEACH POLICE DEPARTMENT

FLORIDA HIGHWAY PATROL

SWORN INTERVIEW - ADVICE OF RIGHTS

I am Trooper _____ of the Florida Highway Patrol conducting a criminal investigation.
This interview is being conducted at_____.
(Location)
Today's date is _____. The time is _____ AM or PM.
Persons present at his interview are _____ (if applicable).
This sworn interview is being taken in relation to ___.

At this time I am advising you of your rights.

Before I ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before I ask you my questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you, without cost, before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you consult a lawyer.

I, _____ had read and explained to me this statement of my rights, and I understand what my rights are. I am willing at this time to make a statement and answer questions. I do not want a lawyer at this time. Any and all statements given by me will be freely and voluntarily. No promises, threats

or inducements of any kind or nature whatsoever have been promised me in order to consent to this interview.

KNOWING MY RIGHTS, I HEREBY, PRIOR TO BEING INTERVIEWED, WAIVE MY RIGHTS TO CONSULT WITH A LAWYER OR TO HAVE ONE PRESENT DURING THIS INTERVIEW. I do hereby affix my signature accordingly.

Signed _____

Date _____

Time _____

Witness: _____

Witness: _____

Time: _____

At this time I will administer the oath.

MSMV 02752 (3/96) 3

Attachment 1

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

CONSTITUTIONAL RIGHTS

Before you make any statement or answer any questions, you must fully understand your constitutional rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in court.

3. You have the right to call or obtain an attorney at this time and have one present now or at any time during questioning.

4. If you cannot afford an attorney, one will be provided for you prior to any questioning if you so desire.

5. If you decide to answer questions now, you have the right to stop answering at anytime during questioning.

I have read the above statement and fully understand what my rights are.

Signed: _____

Date: _____

WAIVER OF RIGHTS

I have carefully read the above information concerning my constitutional rights and I fully understand what my rights are. Knowing these rights, I am willing to make a statement at this time and answer questions posed to me without the presence of an attorney. I have made this decision knowingly, intelligently, and voluntarily. No promises, threats, or inducements of any kind have been made to me, nor has any pressure or coercion been used against me, in order to obtain my statement or to persuade me to answer questions.

Signed: _____

Date: _____

Witness: _____

Witness: _____

Time & Date: _____

Place: _____

_____

Revised: 3/15/00

STATE ATTORNEY, FIRST CIRCUIT

ADVICE OF RIGHTS

Place_____
Date _____
Time_____

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you, without cost, before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am

doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

Witness: _____

Witness: _____

Time: _____

WORLDWIDE
INVESTIGATIONS, INC.

April 2, 2002

State Attorney - Second Circuit
Leon County Courthouse
Tallahassee, Florida 32399-2550

Dear Sirs :

Pursuant to Florida Statutes §119, Public Records Law, please forward me a copy of the Miranda Waiver currently being used by your Office/Department.

The form requested in the one actually signed and initialled by the suspect, not the card read by law enforcement.

Because of the urgency of this request, I would respectfully ask that you expedite this material as it is needed by April 10, 2002. I have enclosed a self-addressed, stamped envelope for your convenience in responding. If there are any further fees required, kindly advise and I will promptly remit same.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ Ronald J. Cacciatore
RONALD J. CACCIATORE

RJC; lw
Enclosure

To ➚
Copy enclosed.
CW Goodwin
SAO 2nd Cir. 4-8-02

750 S.E. Third Ave., Suite 201, Fort Lauderdale, FL 33316 • (954) 524-8144 • Fax: (954) 524-2449

NAME: _____
ADDRESS: PO Box 1033/2000 N. Meri
PLACE: TPD
DATE: 11/10/01 Time: 3:15pm
CASE NUMBER: 01-

STATEMENT OF RIGHTS

Before you answer any question or make any statement, you must fully understand your rights.

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.

5. You can decide at any time to exercise these rights and not answer any questions or make any statement.

_____
NAME OF OFFICER

ACKNOWLEDGMENT OF RIGHTS

1. Do you understand each of these rights I have explained to you?

2. Have you previously requested any law enforcement officer to allow you to speak to an attorney?

3. Having these rights in mind, do you wish to talk to us now?

_____
SIGNATURE

WITNESS
WITNESS
DATE/TIME 11/06/01

PD130 REV 3/90

OFFICE OF THE STATE ATTORNEY
SEVENTH JUDICIAL CIRCUIT OF FLORIDA
VOLUSIA, FLAGLER, PUTNAM & ST. JOHNS COUNTIES

[SEAL]
John Tanner
STATE ATTORNEY
251 North Ridgewood Avenue
Daytona Beach, Florida 32114-7509
Phone (386) 239-7710
SUNCOM 377-7710
Fax (386) 239-7716

April 9, 2002

Mr. Ronald Cacciatore
Worldwide Investigations, Inc.
750 S.E. Third Avenue, Suite 201
Fort Lauderdale, FL 33316

Dear Mr. Cacciatore:

We have received your letter requesting forms. Attached are three forms; Miranda Rights form, Juvenile Waiver of Rights Form, and Garrity Warnings form.

Sincerely,

/s/Robert L. Wheeler
ROBERT L. WHEELER
Administrative Assistant/Chief Investigator

Rw:rm
RWWorldwideInvestig
Attachments

MIRANDA RIGHTS

First, identify yourself. Second, tell the subject the topic of inquiry. Third, read the subject the following:

These are your Rights.

1. You have the right to remain silent and anything you say may be used as evidence against you.

2. You have the right to talk to an attorney and have him with you now or at any time during questioning; if you cannot afford an attorney, one will be appointed to represent you.

3. If at any time you wish to stop talking or to have an attorney present, all questioning will be stopped at your request.

4. Do you understand these rights?

5. Do you waive these rights and are you willing to talk to me?

WAIVER OF RIGHTS

The above statement of my rights has been read to me and I understand each one. Having these rights in mind, I voluntarily waive them and willingly consent to be interviewed. I have not previously invoked my rights with regard to the topic of inquiry.

_____

SIGNATURE

WITNESSED:

_____	_____
SIGNATURE	SIGNATURE
_____	_____
PRINT NAME	PRINT NAME

DATE: _____ TIME: _____ AM/PM

_____

NAME: _____ AGE: _____
AGENCY CASE NO: _____
EDUCATION: _____ SAI CASE NO: _____
FLUENT IN ENGLISH _____ YES ____ NO (DETAILS IF NO): _____

Form 102.SAO (Revised 06/17/92)

[SEAL]

OFFICE OF STATE ATTORNEY
TENTH JUDICIAL CIRCUIT, FLORIDA
Polk, Highlands, and Hardee Counties

Drawer SA, P.O. Box 9000
Bartow, FL 33830-9000 (863) 534-4804
FAX # (863) 534-4945

Lakeland Branch Office
Polk County Government Center
930 East Parker St. Room 238
Lakeland, FL 33801 (863) 499-2596

Winter Haven Branch Office
150 4th Street, N.W.
Winter Haven, FL 33881 (863) 291-5742

Jerry Hill
State Attorney

YOUR RIGHTS

Before we ask you any questions, you must understand your rights:

__ You have the right to remain silent

__ Anything you say can be used against you in court

__ You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning

__ If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish

__ Do you desire to consult with a lawyer first or to have one during this interview?

__ If, at any time hereafter, you wish to remain silent or have a lawyer present, all questioning will be stopped

__ Has anyone, at any time, threatened, coerced, or promised you anything in order to persuade you to make a statement now?

__ Do you understand these rights?

__ Do you wish to talk to us at this time?

WAIVER OF RIGHTS

I have read and understand this statement of my rights. I am willing to make a statement and answer questions at this time. I do not wish to talk to a lawyer. I am giving this statement freely and voluntarily with my rights in mind. There have been no threats, promises, pressure, or coercion of any kind to persuade me to give this statement.

Interviewee	Witness
Date / Time of Interview	Witness

OFFICE OF THE
STATE ATTORNEY
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY

[SEAL]

BARRY E. KRISCHER
STATE ATTORNEY

Tuesday, April 09, 2002

Ronald J. Cacciatore
750 S.E. Third Ave., Suite 201
Ft. Lauderdale, Fl. 33316

Dear Mr. Cacciatore:

In response to your request, enclosed is a copy of the Miranda Waiver currently being used by our office.

Sincerely,

/s/ D. Thomas
Debby Thomas
Public Information

401 North Dixie Highway • West Palm Beach, FL
33401-4209 (561)-355-7100

OFFICE OF THE
STATE ATTORNEY
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY

[SEAL]

BARRY E. KRISCHER
STATE ATTORNEY

MIRANDA RIGHTS

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONING. IDENTIFY YOURSELF AND STATE:

"I'm required to warn you before you make any statement that you have the following Constitutional Rights:

(1) You have the right to remain silent and not answer any questions.

(2) Any statements you make must be freely and voluntarily given.

(3) You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning.

(4) If you cannot afford a lawyer, you are entitled to the presence and representation of a Court appointed lawyer before you make any statement and during any questioning.

(5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

(6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

(7) Any statement you make can be and will be used against you in a court of law."

_____ _____

Signature of Suspect Name of Suspect(printed)

_____

Date Time

_____

Signature of Witness

_____

Signature of Witness

401 N. Dixie Highway, West Palm Beach, Florida 33401-4209 (561) 355-7100

[SEAL]
State Attorney
SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA
530 WHITEHEAD STREET
KEY WEST, FLORIDA 33040-6547

MARK E. KOHL
State Attorney

TELEPHONE
305-292-3400

April 5, 2002

Worldwide Investigations, Inc.
Ronald J. Cacciatore
750 S. E. Third Avenue
Suite 201
Fort Lauderdale, Florida 33316

Dear Sir:

In response to your request for a copy of the Miranda Rights form used by our office, I have enclosed two of those forms. One is in English and one is in Spanish. You should be aware that there is no standard form used by our office and that generally Miranda is read fiom a card. The forms that I have provided are copies of forms that one of the investigators has used in the past. However, there is no standardization for our forms on Miranda.

If there is anything additional that you need, please feel free to contact me.

Sincerely,

/s/ Mark E. Kohl

Mark E. Kohl
State Attorney

MEK/da

INTERROGATION - ADVICE OF RIGHTS

YOUR RIGHTS

Date _____ Place _____

Time _____ AM/PM _____

BEFORE we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in a court of law.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her present with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am

doing. No promises or threats have been made to me and no presssure or coercion of any kind has been used against me.

Signed _____

_____
Witness

_____
Witness

Time _____ AM / PM

Defendant's Name: _____

Date: _____

DECLARACION DE DERECHOS

Antes de hacerle algunas preguntas, usted tiene que entender:

-usted tiene el derecho de permanecer callado.

-cualquier cosa que usted diga, se puede usar en su contra en la corte.

-usted tiene el derecho de consultar con un abogado, antes de hacerle algunas preguntas, y tener dicho abogado presente durante el interrogatorio.

-si usted no puede pagar para los servicios de un abogado, uno será nombrado para usted, antes de cualquier interrogatorio, si usted desea.

¿entiende usted? Sí_____ No _____

Firma: _____

Witness: _____

Witness: _____

OFFICE OF THE
State Attorney
NINETEENTH JUDICIAL CIRCUIT OF FLORIDA
SERVING
INDIAN RIVER, MARTIN, OKEECHOBEE
AND ST. LUCIE COUNTIES

[SEAL]
Bruce H. Colton
State Attorney

411 South Second Street
Fort Pierce, Florida 34950
(561) 465-3000
Fax (561) 462-1214

April 5, 2002

Ron Cacciatore
World Wide Investigations

Re: public records request for Miranda Waiver Form

Dear Mr. Cacciatore:

Here is a copy of the Miranda waiver form currently used by our State Attorney Investigators. If you have any question, feel free to call.

Sincerely,

/s/ Lawrence Mirman
Lawrence Mirman
Attorney In Charge
Legal Affairs

STATE ATTORNEY'S OFFICE
19TH JUDICIAL CIRCUIT

INTERROGATION: ADVICE OF RIGHTS

YOUR RIGHTS

Place _____

Date _____

Time _____

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make

a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

Witness: _____

Witness: _____

Time: _____

JOSEPH P. D'ALESSANDRO
STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT
P.O. BOX 399
FORT MYERS, FL 33902

941-335-2726
FAX No.: 941-335-2360

Fax

TO: Ronald Cacciatore	From: Mike Dickman
Fax: (954) 524-2449	Pages: 2
Phone:	Date: 4-10-02
Re:	CC:

☐ Urgent ☐ For Review ☐ Please Comment
☐ Please Reply

SUBJECT: Miranda Waiver - Public Records request dated April 2, 2002.

THIS COMMUMCATION IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering this communication to the intended recipient, you are hereby notified that any distribution, use or copying of this communication is prohibited. If you have received this communication in error, please notify us immediately by telephone at 941-335-2726 and return

the original to us at the above address via the U.S. Postal Service. Thank you.

STATE ATTORNEY'S OFFICE
20TH JUDICIAL CIRCUIT

CASE # _____

PLACE: _____

TIME: _____

DATE: _____

INVESTIGATOR: _____

WARNING OF CONSTITUTIONAL RIGHTS

NAME: _____

1. You have the right to remain silent.

2. Anything you say can be used against you in court.

3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning if you wish.

4. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

5. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

==========

1. Do you understand each of these rights I have explained to you?

Yes ____ No ____ Initials _____

2. With these rights in mind, do you wish to talk to us now?

Yes ____ No ____ Initials _____

Witness_____

WAIVER OF RIGHTS

I HAVE carefully read the above statement and I fully understand what my rights are. I do not want an attorney at this time and I am willing to make a statement and answer any questions concerning this investigation. I fully understand and know what I am doing. No promises, threats, or inducements have been made to me and no pressure or coercion of any kind has been used against me.

(SIGNED)_____

WITNESS: _____

WITNESS: _____

TIME: _____

YOUR RIGHTS PER MIRANDA

BEFORE WE ASK YOU ANY QUESTIONS CONCERNING A ALLEGED

_____

YOU MUST FULLY UNDERSTAND YOUR RIGHTS PER MIRANDA.

MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.

2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.

3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE QUESTIONED.

4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH.

5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

1. DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?

2. HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?

WITNESS: _____

WITNESS: _____

TIME & DATE: _____

PLACE: _____

OFFICER: _____

_____

SIGNED

ADVISEMENT OF MIRANDA RIGHTS

TIME: _____ DATE: _____

PLACE: _____ CASE #: _____

GIVE THIS WARNING TO ANY SUSPECT DETAINED PRIOR TO ANY QUESTIONS. IDENTIFY YOURSELF AND STATE:

"I am required to warn you before you make any statement that you have the following Constitutional Rights:

1) You have the right to remain silent and not answer any questions.

2) Any statement you make must be freely and voluntarily given.

3) You have the right to the presence and representation of a lawyer of your choice before you make any statement and during any questioning.

4) If you cannot afford a lawyer, you are entitled to the presence and representation of a Court-appointed lawyer before you make any statement and during any questioning.

5) If at any time during the interview you do not wish to answer any questions, you are privileged to remain silent.

6) I can make no threats or promises to induce you to make a statement. This must be of your own free will.

7) Any statement can be and will be used against you in a court of law.

8) Do you understand these Rights as they have just been read to you?"

Suspect's Answer: _____

Signed: _____

Witness: _____

Witness: _____

Time: _____

Date: _____

Place: _____

[SEAL]

MIRANDA WARNING

BEFORE I ASK YOU ANY QUESTIONS, I WANT TO ADVISE YOU OF YOUR CONSTITUTIONAL RIGHTS.

1. You have the right to remain silent.

2. Anything you say can be used against you in a court of law.

3. You have the right to talk with a lawyer and have a lawyer present before any questioning.

4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.

Do you understand each of these rights I have read to you? _____

WAIVER OF RIGHTS

I, _____, have read this statement of my rights or have had it read to me and I understand what my rights are. With these rights in mind I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.

_____ 2/15/02 1900 hrs
Signature Date/Time

_____
Witness Signature Date/Time

Deputy Signature/CCN Date/Time

Location: PSB

Case #: PB02-02-4118

BSO RP#17A (New 2/99)

Exhibit "A"

(Rev 2/27/07)

ADVICE OF RIGHTS

Place_____
Date_____
Time_____

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

Signed _____

Witness: _____

Witness: _____

Time: _____

FBI FORM

Exhibit "B"

APPENDIX B

TAMPA POLICE DEPARTMENT

LEGAL BULLETIN

June 30, 2009

TO: ALL SWORN PERSONNEL

FROM: KIRBY C. RAINSBERGER /KCR
Police Legal Advisor

SUBJECT: New Supreme Court Opinion Regarding Interrogation of Suspects after Arraignment
Legal Bulletin #09-14

This legal bulletin applies to situations where it is necessary to question a subject who is in jail and has already obtained, or has been appointed, a lawyer. This area of the law is very complex and errors by officers can have drastic consequences.

For more than twenty years, the courts have held that once counsel has been appointed for, or obtained by, an arrested individual, that individual could not be interrogated by police conerning the incident for which he was arrested without the presence of the lawyer except when the contact was initiated by the subject

himself. In *Montejo v. Louisiana*, 129 S.Ct. 2079 (May 26, 2009), the rules were somewhat changed. Essentially, the Court combined the rules regarding Fifth Amendment right to counsel[1] with the rules regarding Sixth Amendment right to counsel. The Court specifically held that the procedures applicable to protect the right to counsel under the Fifth Amendment were sufficient to protect the right to counsel under the Sixth Amendment even after the subject has been appointed or otherwise has obtained an attorney.

The basic rules developed in cases decided under the Fifth Amendment **must** be known and followed by officers without exception:

1. Any suspect has the right to remain silent in response to police questioning. A suspect who is **in custody** has the right to have an attorney present before and during questioning **and** has the right to be informed of all of the foregoing. *Miranda v. Arizona*, 86 S.Ct. 1602 (1966).

2. Once a suspect has unequivocally invoked his right to counsel, all interrogation must **cease** until counsel is provided. *Edwards v. Arizona*, 101 S.Ct. 1880 (1981).

3. Even after counsel has been provided, no subsequent interrogation may occur while the

---

[1] The actual relevant right mentioned in the Fifth Amendment is the right against compelled self-incrimination. The right to have an attorney before and during custodial interrogation is merely a judicially created way to ensure that the right against compelled self-incrimination is protected.

subject is continuously in custody unless counsel is present. *Minnick v. Mississippi*, 111 S.Ct. 486 (1990).

4. The Fifth Amendment right to counsel may only be invoked during or immediately preceeding custodial interrogation. *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991).

5. Once the right to counsel is properly invoked, there can be **no** further interrogation outside the presence of counsel by **any** law enforcement officer as to **any** criminal act for as long as the suspect is continuously in custody unless the suspect himself initiates the contact and questioning. *Arizona v. Roberson*, 108 S.Ct. 2093 (1988).

It should be immediately apparent that once a subject invokes his right to counsel in a custodial interrogation setting, police questioning is effectively over for at least as long as the subject is in custody. Before contacting an incarcerated subject for any criminal interview, officers must first determine whether he has invoked his right to counsel in an interrogation setting at any time during his present term of incarceration, in front of any officer from any agency regarding any investigation. That means you need to know who he has talked to since the moment of his arrest. You need to talk with those officers or investigators to find out if the subject at any time invoked his right to counsel. You need to review all reports to look for any reference to the subject invoking his right to counsel. The only thing that has now changed, is that officers no longer need to concern themselves with what has transpired in front of a

judge or with the forms used by the Public Defender's Office which purport to invoke Fifth and Sixth Amendment rights.

Because officers must scrupulously honor a suspect's request for a lawyer, it is obviously better from a law enforcement perspective if the suspect does not request a lawyer. Officers need to administer *Miranda* warnings lawfully and intelligently:

1. **Only** recite the *Miranda* warnings to a person who is in custody or otherwise not free to leave. *Miranda* applies only to **custodial** interrogation, not to general inquiries.

2. Only recite the *Miranda* warnings to a person whom you need to question while in custody. **Do not** automatically recite *Miranda* to every person you arrest. Sometimes, by the time a person is in custody, your case is solid and you don't need to question the subject. Sometimes, the suspect must be questioned but **not by you**. If you routinely blurt out *Miranda* warnings for no particular reason and the suspect equally thoughtlessly says he'll take the free lawyer, the latent investigators have just lost their best opportunity to help resolve the case, and perhaps many others.

3. You may re-approach a suspect who invokes his right to remain silent, but **not** one who invokes his right to counsel. Therefore, if the suspect is not going to talk to you at the moment, there is no need to give him a chance to also invoke the right to counsel. You should verbally advise the subject directly from the SAO card that he has

the right to remain silent and that anything he says can be used against him in court. **Stop right there**. Ask the suspect if he wants to talk about the matter now. If he says, "**No**," go no further with the rights advisement or the interview. Because he did not invoke the right to counsel, you may re-approach the suspect in a few minutes or a few hours and ask if he has changed his mind about talking to you. Until his answer is "yes" there is no need to mention the right to counsel. When the suspect indicates a willingness to talk, start over with the rights advisement from the SAO card and **now** advise him of the right to counsel. If he invokes at this point the interview is over but you have done all you can do. Be sure to note in your report that the suspect invoked his right to counsel.

Please contact my office with any questions.

KCR:jak

AMICUS CURIAE BRIEF

No. 08-1175

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN D. HACKER
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National Association of
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Washington, DC 20006
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Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation founded in 1958 with over 13,000 subscribed members—including military defense counsel, public defenders, private practitioners, and law professors—and an additional 35,000 state, local, and international affiliate members. NACDL seeks to encourage the integrity, independence, and expertise of defense lawyers in criminal cases, to ensure justice and due process for persons accused of crimes, to promote the proper and fair administration of criminal justice, and to preserve, protect, and defend the U.S. Constitution—not least, the right to counsel during police interrogations. NACDL has filed numerous amicus briefs in cases before this Court implicating that right, including in *Missouri* v. *Seibert*, 542 U.S. 600 (2004) and *Dickerson* v. *United States*, 530 U.S. 428 (2000).[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many defendants who have been subjected to custodial interrogation,

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

whether at the state or federal level, and who will be directly affected by the Court's decision in this case.

INTRODUCTION

More than forty years ago, this Court held that a confession obtained in custodial interrogation is inadmissible if the confessing suspect was not properly informed of his right to the presence of counsel during that interrogation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Just nine years ago, the Court reaffirmed that principle and confirmed its constitutional status. *Dickerson*, 530 U.S. 428 (2000). In the decades that passed from *Miranda* through *Dickerson* and to the present day, the *Miranda* rule has garnered nearly universal compliance. As the Solicitor General's brief acknowledges, 97% of U.S. jurisdictions employ *Miranda* warnings that expressly inform a suspect of his right to have counsel present during his interrogation.

The City of Tampa, however, does not. Several years ago, the City made a carefully calculated policy decision to adopt a standard-form *Miranda* warning that *does not* describe the right to the presence of counsel during the interrogation. Although every Florida court to consider Tampa's warning has found it to be constitutionally deficient *in substance*, not just form, the State itself (with the support, if not quite the active encouragement, of the United States) now seeks reversal of its own judiciary's rulings, asking this Court to declare Tampa's defective warning to be permissible under the Fifth Amendment.

If this Court were to uphold the Tampa warning as constitutionally adequate under *Miranda*, its decision would upset forty years of established *Miranda* jurisprudence, as well as the police practices adopted

almost uniformly nationwide to implement *Miranda*'s core protections. As the Solicitor General points out, the Fifth Amendment values embodied in *Miranda* are best served when law enforcement agencies employ standardized warnings that expressly describe all the rights afforded suspects by the Fifth Amendment. See U.S. Br. at 6, 11-12. All federal agencies do so as a matter of policy, and, according to a recent study, so do the overwhelming majority of non-federal jurisdictions. See Richard Rogers *et al.*, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 10, Table 7 (2008). Tampa is one of a handful of extreme outliers that have consciously chosen to depart from *Miranda* and the explicit warnings it prescribes.

If the Petitioner prevails here, however, this will all change. At stake in this case is not only the constitutional deficiency of Tampa's alternative pre-interrogation warning, but a much larger issue: whether law enforcement agencies may systematically depart from *Miranda* and provide less than what it plainly requires.

If this Court were to approve the non-compliant form warning in this case, jurisdictions across the nation would have every incentive to adopt a similar warning themselves. Thus the inferior warning that the Petitioner admits is a "deviation" will almost certainly become the new standard warning. And why stop there? More and more jurisdictions would adopt their own non-compliant warnings, reassured that even if they expressly advise their officers to omit or obscure one or more of *Miranda*'s signal protections, the resulting warning will be given a "flexible" and forgiving reading by the courts. A "race to the bot-

tom" would inevitably ensue, as States and municipalities test the limits again and again with their form warnings, in an effort to skirt the edges of the Fifth Amendment while still minimizing the presence of lawyers who they believe may interfere with their information-gathering function. The result would be the same sort of abuses that led this Court to adopt *Miranda* in the first place.

Just as important—and perhaps more so—is the effect that reversal here would have on the *Miranda* rule as it is applied by the courts. As it now exists, *Miranda* provides a predictable, "bright line" rule. If a confession follows a valid *Miranda* warning and waiver, it is presumptively admissible. If not, it is inadmissible. The simplicity of that bright-line rule is not merely an administrative convenience; it is a key element of the constitutional protection itself. Indeed, one of *Miranda*'s virtues is its predictability. For decades, it has provided a standard framework that protects the rights of suspects while enabling law enforcement to conduct investigations in a fashion that minimizes the risk that critical evidence will later be excluded from trial. To permit individual jurisdictions to craft their own, substantively different *Miranda* warnings would severely undermine the predictability of the rule—encouraging experimentation by law enforcement, increasing litigation over interrogations, and ultimately (and most importantly) sacrificing the constitutional rights of those being questioned. The result would be a death spiral for *Miranda* and its protections.

NACDL and NAFD urge this Court not to pursue that course. The decision of the Supreme Court of Florida should be affirmed.

STATEMENT OF THE CASE

The details of Powell's arrest, interrogation, and conviction are amply set forth in the Respondent's brief and the decision below. The constitutional issues presented by those events revolve around the pre-interrogation warning read to Powell prior to his confession. The key features of that warning are its provenance and its substance. First, the warning was not an *ad hoc* statement but a standardized form, adopted and used systematically by the Tampa police. Second, the warning departed in significant respects from the full-form warnings described in *Miranda*, which inform suspects explicitly of all the applicable Fifth Amendment rights.

The standard-form pre-interrogation warning employed by Tampa was as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview. JA 3.

That language is broadly similar to the language of pre-interrogation warnings used by police all over the country—with one glaring exception. Whereas the overwhelming majority of jurisdictions—97% of them, according to a recent study—expressly advise suspects of their right to the *presence* of an attorney *during* the interrogation, the Tampa warning completely omits any mention of that right. At best, as

argued by the State, the last sentence of the warning apprises the suspect that he may invoke previously described rights "at any time * * * during the interview." But the only right to counsel previously described is the right to talk to a lawyer "before answering any of our questions." So even if the suspect listens closely and is clever enough to parse the warning just as the State describes it, *at most* what the suspect could understand is that he may *exit* the interview following a question, consult with his lawyer, and then *return* to the interview to provide his answer. No one familiar with the English language could read the Tampa warning as advising a suspect that he may have his lawyer present with him in the room *while the police are actually questioning him* and while he is giving his answers.

Presented with that departure from the basic requirements of *Miranda*, Florida's Second District Court of Appeal reversed Powell's conviction on the ground that the warning read to him violated his Fifth Amendment rights as articulated and guaranteed by this Court in *Miranda*. Specifically, that court concluded that because the Tampa warning on its face did not advise suspects of their right to the presence of counsel "throughout interrogation," it was not a "functional equivalent of the required *Miranda* warning." JA 146 (*Powell* v. *State*, 969 So. 2d 1060, 1063 (Fla. 2d Dist. Ct. App. 2007)).

The Florida Supreme Court agreed to hear the case and affirmed the Court of Appeal. Acknowledging this Court's oft-recited rule that "there is no talismanic fashion in which [warnings] must be read or a prescribed formula they must follow," it nevertheless concluded that the general policy of flexibility in the specific language of pre-interrogation warnings

did not apply to warnings that were actually "misleading." JA 171. The Tampa warning was "misleading," the court concluded, for the straightforward reason that the right to "talk to" a lawyer "*before* questioning" cannot reasonably be said to inform the suspect that he is entitled to the presence of that lawyer *during* questioning. "Before" does not imply "during," any more than "above" implies "between."

One of the six justices dissented, arguing in part that the Tampa warning could be parsed so as to "avoid[ ] the implication * * * that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." Taking the view that a *Miranda* warning need only "reasonably convey" a suspect's rights, the dissent concluded that the warning satisfied that standard. The dissent—like both the Petitioner and the Solicitor General here—relied heavily on the warning's final clause, which states that the suspect possessed "the right to use any of these rights at any time you want during this interview." Noting that the final clause referred to "any" of the rights previously disclosed, the dissent concluded that this clause essentially converted the limiting preposition "before" into the non-limiting prepositional phrase "at any time." JA 179-80.

SUMMARY OF ARGUMENT

The rule of *Miranda* is simple and concrete: a suspect's confession is presumptively admissible (in the absence of other evidence suggesting coercion) only if he was previously given either (a) the warnings expressly prescribed in *Miranda* itself, or (b) some "fully effective equivalent" to those warnings.

If these warnings were not given, the confession must be excluded.

Here, it is undisputed that the standard-form warning given to Powell did not include the full *Miranda* warning, because it omitted his right to have an attorney present during the interrogation. Neither the Petitioner nor the United States has attempted to argue that the Tampa form warning was a "fully effective equivalent." Nor could they credibly do so: it would defy reason to claim that a warning that wholly omitted mention of the right to have counsel *present during questioning*—and instead at most advised Powell that he could consult with counsel before answering any questions—was a "fully effective equivalent" to a warning that explicitly advised Powell he could have his lawyer at his side during the entire interrogation.

Rather than defending the Tampa warning as "fully effective," the Solicitor General argues for a weaker standard, claiming that the deficient warning was constitutionally sound because it "reasonably conveyed" the substance of Powell's *Miranda* rights. But the more forgiving "reasonably conveyed" standard is based on a single snippet of language from a twenty-year-old decision, unsupported by any discussion or analysis. There is no basis for the conclusion that this Court ever intended to lower the bar of *Miranda* compliance from "fully effective equivalent" to a mere "reasonableness" standard that could be met even when the suspect was *not* expressly advised of the right in question. Under the correct standard, there is no serious dispute that the Tampa warning is constitutionally deficient.

Moreover, even if "reasonably conveys" were the correct standard, the Tampa warning would fail it. As a matter of law, a law enforcement agency's policy decision to depart systematically from the explicit warnings required by *Miranda* is dispositive evidence that its alternative warning does not "reasonably convey" the substance of a suspect's *Miranda* rights. At least in the absence of some other legal basis for departing from *Miranda*, the mere fact of the departure—given the ready availability of long-established, constitutionally acceptable warnings—suggests that its purpose is precisely to dilute the effectiveness of the warning. Under this Court's decision in *Seibert*, 542 U.S. at 617, police strategies with the purpose or effect of "thwart[ing] *Miranda*'s purpose" render any confession obtained thereby inadmissible under the Fifth Amendment.

Finally, reversal of the decision below would effectively authorize individual jurisdictions to "experiment" with their *Miranda* warnings, in the hope of crafting a warning that nominally "touches all the bases" of *Miranda* while omitting, altering, or distorting the substance of the warning in ways likely to mislead or confuse suspects about their constitutional rights. That result would trigger a classic "race to the bottom," in which law enforcement agencies across the country would adopt what they understood to be minimally acceptable pre-interrogation warnings, pushing the limits each time a new limit is set. Not only would that outcome dilute the constitutional rights of suspects, but it would also distort the "bright line" that has long characterized the *Miranda* rule—and in so doing, would destroy the consistency and predictability that are among *Miranda*'s great virtues.

ARGUMENT

I. Contrary To The Solicitor General's Claim, "Providing Suspects With Conventional And Precise *Miranda* Warnings" *Is* A Constitutional Mandate, Unless The Government Proves That The Warning Actually Used Was "At Least As Effective" As The *Miranda* Warning.

The Solicitor General devotes a substantial portion of her brief to the proposition that "conventional and precise" *Miranda* warnings are desirable but not constitutionally required. U.S. Br. at 9-17. That proposition is wrong. While it is true that "verbatim recitals" of *Miranda*'s precise language are not constitutionally required, it is equally true that the substance of that language—or its "fully effective equivalent"—*is* constitutionally required. And because the *Miranda* regime is based on warnings, it is impossible to completely divorce the substance of those warnings from the words used to convey them. One need not afford "talismanic significance" to the literal words of *Miranda* to conclude that a warning that simply omits mention of a constitutionally guaranteed right is not a "fully effective equivalent" of the *Miranda* warning identifying that right.

The Solicitor General convincingly lays out the virtues of full-form *Miranda* warnings, in which the interrogator informs the suspect of each of *Miranda*'s elements expressly. See U.S. Br. at 9-12. NACDL and NAFD shares the Solicitor General's conviction about those virtues. NACDL and NAFD part ways with the Solicitor General, however, when she articulates the legal status of those virtues. While she acknowledges—and even lauds—the value of prescrib-

ing "standardized warnings that explicitly refer to each aspect of the suspect's [*Miranda*] rights," she insists that such warnings are not a "constitutional mandate." U.S. Br. at 9. We disagree, and so—we believe—does this Court.

In *Miranda* itself, the Court stated emphatically that "unless *other fully effective means* are adopted to notify" the suspect of his Fifth Amendment rights * * * the following measures are *required*: He "*must* be warned prior to any questioning" that (1) "he has the right to remain silent, that anything he says can be used against him in a court of law"; (2) "he has the right to the presence of an attorney"; and (3) "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479 (emphasis added); see also *id.* at 444.

The rule of *Miranda* is simple: once in custodial interrogation, suspects must be given either the explicit warnings delineated in *Miranda* or equivalent warnings that are "*at least* as effective." *Id. at* 467; see also *id.* at 444 (requiring "other fully effective means"), 476 ("fully effective equivalent"), 479 ("other fully effective means"). This Court has never retreated from that principle. To the contrary, it has embraced it as necessary to any "reasonable and faithful interpretation of the *Miranda* opinion." *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975); see also *California* v. *Prysock*, 453 U.S. 355, 359-60 (1981) (quoting with approval *Miranda*'s statement that "[t]he warnings required and the waiver necessary in accordance with [the *Miranda* opinion] are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant") (emphasis added in *Prysock*); *Withrow* v. *Wil-*

liams, 507 U.S. 680, 689 (1993) (describing *Miranda* as prescribing, "absent other fully effective means," the warnings set forth in that opinion) (quotation omitted); *Dickerson*, 530 U.S. at 429 (reciting *Miranda*'s holding that any alternative to the basic *Miranda* warning "must be at least as effective in apprising accused persons of their right to silence") (quotation omitted).

In short, the core principle announced in *Miranda* remains fully vital: for a confession to be voluntary and admissible, the suspect must receive either the warnings expressly described in *Miranda* or some "fully effective equivalent" thereof.

II. The Tampa Warning Is Manifestly Not A "Fully Effective Alternative" To A Standard *Miranda* Warning, And Neither The Petitioner Nor The Government Has Argued Otherwise.

There is no serious question in this case about the inadequacy of the Tampa warning under this standard: the Tampa warning is simply not a "fully effective equivalent" to the warning delineated in *Miranda*. The warning prescribed in *Miranda* explicitly describes the suspect's right to have counsel present during questioning; the Tampa warning does not. Nor can the Tampa warning reasonably be read to *imply* that right—even under the kind of "close textual parsing" that the Solicitor General openly concedes is not appropriate in this context.[2] As shown above, there is no way to read the rule as stating, implying, or even vaguely suggesting, that the suspect is entitled to have a lawyer *physically present*

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[2] See, *e.g.*, U.S. Br. at 8, 18, 20, 21.

with him during the interrogation process. At best, the Tampa warning might be read—putting the last sentence together with the second—as advising a suspect that he may consult with a lawyer after a question, and before answering it. Nowhere does the warning advise the suspect that he has a right to have a lawyer at his side throughout questioning, whether he ultimately chooses to consult with the lawyer or not. Because the Tampa warning omits mention of that foundational *Miranda* protection, it necessarily is not "at least as effective" as explicit notice of that right.

Tellingly, the Solicitor General has not even attempted to argue otherwise. Instead, she avoids the issue, addressing her arguments to two wholly different inquiries.

First, she argues that although "law enforcement agencies would be well advised to adopt * * * precise and standardized warnings," they are not *required* to do so because *Miranda* does not prescribe "rigidity in the *form* of the required warnings." U.S. Br. at 13 (quoting *Prysock*, 453 U.S. at 359) (emphasis in U.S. Br.). This is a red herring: the decision below excluded Powell's confession not because the "form" of Tampa's warning was inadequate, or because its "precise wording" deviated from some "conventional formulation," *id.* at 14-15, but because the warning's *substance* was so obviously constitutionally deficient. The warning "did not effectively convey to Powell his right to the presence of counsel before and during police questioning" and was in fact "misleading" as to the existence of that right. *Florida* v. *Powell*, 998 So. 2d 531, 541 (2008).

Thus, the Florida Supreme Court's decision turned, not on semantic or technical considerations, but rather on established principles of constitutional law. If a pre-interrogation warning is "likely to mislead and depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights," any resulting confession is inadmissible under the Fifth Amendment. *Missouri* v. *Seibert*, 542 U.S. 600, 613-14 (2004) (quotation omitted). The Solicitor General's extensive arguments against "enforc[ing] a rigid adherence to a single script by the police" are attacks on a strawman. U.S. Br. at 15.

Second, the Solicitor General argues that the standard for assessing a *Miranda* warning is whether, "read in [its] totality," it "reasonably conveys the substance" of the *Miranda* rights." U.S. Br. at 17-21. But a warning that "reasonably conveys" the substance of those rights still may not be a "fully effective equivalent" to the full *Miranda* warnings—and the latter is the governing standard. See *supra* at 10-12.

The "reasonably conveys" language entered this Court's jurisprudence in *Duckworth* v. *Eagen*, 492 U.S. 195, 203 (1989), without discussion or analysis. Indeed, the passage in question simply quotes *Prysock* while swapping out the word "fully" in favor of "reasonably," such that *Prysock*'s conclusion that "the police in this case *fully* conveyed to respondent his rights as required by *Miranda*," when repeated in *Duckworth*, became the requirement that "the warnings *reasonably* 'conve[y] to [a suspect] his rights as required by *Miranda*'" (emphasis added). Compare *Prysock*, 453 U.S. at 361 with *Duckworth*, 492 U.S. at 203. *Prysock* is consistent with the exacting standard set forth in *Miranda*; if *Duckworth*'s snippet of lan-

guage were taken literally, *Duckworth* would not be. And in the absence of any analysis or discussion suggesting that the *Duckworth* Court affirmatively intended to change the long-standing standard for *Miranda* compliance, we can only conclude that there was no such intention.[3] This is particularly true given the Court's continuing reliance, long after *Duckworth*, on *Miranda*'s more stringent standard. See, *e.g.*, *Dickerson*, 530 U.S. at 429 (stating that an alternative to the basic *Miranda* warning "must be 'at least as effective in apprising accused persons'" of their Fifth Amendment rights).[4]

By declining even to assert that the Tampa warning is a "fully effective equivalent," the Solicitor General has all but conceded that under the established standard for *Miranda* compliance, the Tampa warning is constitutionally deficient. The same is true for the Petitioner: its *Miranda* analysis is explicitly based on the "reasonably conveys" standard and never addresses (but merely quotes) the requirement

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[3] Neither the parties nor the United States as *amicus curiae* in *Duckworth* argued for a "reasonably conveys" standard, or for any reduction in the rigor of traditional *Miranda* analysis. The phrase seems to have appeared unbidden in the Court's opinion.

[4] Even if there were some basis for concluding that *Duckworth*'s "reasonableness" formulation was consciously designed to ease the prosecution's burden in proving compliance with *Miranda*, that formulation still would not govern. The Court's use of the "reasonably conveys" language was expressly linked to its conclusion that "[t]he prophylactic *Miranda* warnings are not themselves rights protected by the Constitution." *Duckworth*, 492 U.S. at 203 (quotation omitted). That conclusion, to the extent it was ever valid, was squarely rejected by a seven-member majority of this Court in *Dickerson*. See 530 U.S. at 428, 440 (holding that "*Miranda* is constitutionally based").

of a "fully effective equivalent." See Pet. Br. at 10, 16 (applying "reasonably conveys" standard).

III. Under Any Standard, A Law Enforcement Agency's Adoption Of A Form Warning That Systematically Omits Mention Of A Core Fifth Amendment Right Cannot Pass Constitutional Muster.

Even if the Solicitor General were correct to rely on the "reasonably conveys" language employed in *Duckworth*, the Tampa warning still fails. This kind of systematic police departure from *Miranda* strongly suggests an institutional strategy to dilute the effectiveness of constitutionally required warnings. As such, it triggers the rule announced by this Court in *Seibert*: where police employ a "strategy adapted to undermine the *Miranda* warnings," confessions elicited by that strategy are involuntary and inadmissible. *Seibert*, 542 U.S. at 616.

As we have demonstrated, the Government's reliance on the "reasonable conveyance" standard is misplaced: the correct standard for assessing deviations from the full *Miranda* warnings is the "fully effective equivalent" standard. But even if the "reasonable conveyance" standard governed here, the Tampa warning would fail it. As a matter of law, a law enforcement agency's policy decision to depart *systematically* from the explicit warnings required by *Miranda* is *prima facie* evidence that its alternative warning does not "reasonably convey" the substance of a suspect's *Miranda* rights.

This conclusion follows directly from this Court's decision in *Seibert*, 542 U.S. at 611-17. In that case, the Court assessed the admissibility of confessions extracted through so-called "question first" interroga-

tion—an interrogation method advocated by many law enforcement agencies in which a suspect is initially questioned without a *Miranda* warning and encouraged to confess; after the confession occurs, she is "Mirandized" and asked to repeat her previous (unwarned) statement. *Id.* at 605-06. The Court ruled that confessions obtained using the "question first" tactic are inadmissible, concluding that the "manifest purpose" of the tactic was "to get a confession the suspect would not make if he understood his rights at the outset." *Id.* at 613. Distinguishing its decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), as an example of a "good-faith *Miranda* mistake * * * posing no threat to warn-first practice generally," the Court strongly rejected the systematic "question first" tactic as "a police strategy adapted to undermine the *Miranda* warnings." *Seibert*, 542 U.S. at 616. By "threaten[ing] to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted," the Court held, such strategies require the conclusion that the warnings did not "serve[ ] their [constitutional] purpose." *Id.* at 617. Confessions obtained through such strategic police measures are therefore inadmissible.[5]

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[5] The *Seibert* Court expressly disclaimed any implication that evidence of the interrogator's subjective intent to undermine *Miranda* was relevant to its analysis, noting that the focus should remain on "facts apart from intent that show the question-first tactic at work." There is thus no need to inquire into the subjective intent of the Tampa police department in adopting its warning. Even if there were, however, there is substantial evidence that Tampa did, in fact, affirmatively seek to dilute its *Miranda* warnings to produce more confessions. See generally Brief for Professor Richard A Leo as *Amicus Curiae* in Support of Respondent.

The same analysis governs here. The decision by the Tampa police to employ a standard-form warning that omitted any express reference to a core *Miranda* right—the suspect's right to the presence of an attorney during questioning—itself requires the inference that the warning is intended to "deprive[e] a defendant of knowledge essential to his ability to understand the nature of his rights." *Seibert*, 542 U.S. at 613-14 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986)). There is simply no basis for any other conclusion. As the Solicitor General notes, a recent study of *Miranda* warnings found that 97% of the warnings in use today expressly refer to the suspect's right to the presence of an attorney during questioning. U.S. Br. at 13 n.4 (citing Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008)). This virtual consensus nationwide appears to be consistent with the trend in Florida as well. See *Roberts* v. *State*, 874 So. 2d 1225, 1227 (Fla. 4th Dist. Ct. App. 2004) (taking notice that 89 of 90 *Miranda* forms used in Florida "contained the warning that the accused is entitled to an attorney during questioning, or words to that effect"); see also *Rigterink* v. *State*, 2 So. 3d 221, 254 (Fla. 2009), (per curiam) (noting that the "pervasive use [in Florida jurisdictions] of *Miranda* warnings that fully inform a person of his or her right to an attorney prior to and *during* questioning confirms that our holding in *Powell* does not unnecessarily burden the proper investigation of crime.") [*petition for cert. filed* 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229)]. Having chosen to make itself an outlier against such a universal position, Tampa should bear the burden of showing that its warning does nothing

to undermine the efficacy of the *Miranda* warning. It cannot do so.

In attempting to justify the Tampa warning's systematic departure from the *Miranda* standard, the Solicitor General offers a lengthy defense of what it calls "variations from the conventional *Miranda* warnings." U.S. Br. at 13-16. But that defense only highlights the deficiency of the Tampa warning. The Solicitor General essentially argues for a "flexible" approach to *Miranda* warnings to guard against *inadvertent* departures from the standard: she points out that "agents not infrequently make mistakes" in giving the warnings, and that the challenges of translation and administration of the warnings require a lenient, non-technical approach to determining their adequacy. *Ibid.*

None of that matters here. This case does not involve an agent's inadvertent mistake, or a minor error in translation, or a warning administered in an "overseas interrogation[ ]." *Id.* at 14. To the contrary: this case involves a calculated decision by a law enforcement agency to design and employ a pre-interrogation warning that omits any reference to one of the core constitutional rights protected by *Miranda*—the right not just to consult with a lawyer before answering a given question, but to have a lawyer present throughout the questioning process. For that reason, it is the rigorous analysis of *Seibert*, not the relaxed inquiry favored by the Solicitor General, that must govern here.

IV. Approval Of Tampa's Warning By This Court Would Trigger A "Race To The Bottom" And Undermine The Clarity And Predictability That Are The Hallmark Of *Miranda*.

In the end, the continued vitality of *Miranda* and the rights it protects require that the Court affirm the decision below. A reversal in this case would undermine the bright-line rule announced by *Miranda* and would trigger a "race to the bottom" as law enforcement agencies contrive new, more equivocal warnings that emasculate *Miranda's* protective effect.

Reversal here would not merely constitute this Court's approval of Tampa's particular *Miranda* deviation; more important, it would signal that *other* jurisdictions are also free to adopt alternative warnings that—like this one—simply omit reference to an acknowledged Fifth Amendment right, or that otherwise seek to obfuscate suspects' rights. The result would be a classic race to the bottom. In fact, even if each individual *Miranda* alternative ultimately passed constitutional muster, the proliferation of different standards would undermine the benefits of clarity and predictability secured by *Miranda's* "bright line" rule.

The erosion of *Miranda* would not be merely an administrative inconvenience: it would undermine the *Miranda* rights themselves, which are meaningful and effective only to the extent the "bright line" exists to give "concrete constitutional guidelines" to courts, and in turn to incentivize police to protect suspects' rights under the Self-Incrimination Clause. By creating the bright-line analysis, *Miranda* offers

what is essentially a rule of decision—a decisional framework within which courts may give adjudicative effect to core constitutional rights including against self-incrimination, the real-world parameters of which are difficult to define. See, *e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). As such, its value as a constitutional rule depends upon what this Court has called the "ease and clarity of its application": the more ambiguous or multivariate the rule, the less effectively it will encourage police to adhere to constitutional standards, and the less protection it will afford to suspects and their Fifth Amendment rights. *Moran*, 475 U.S. at 425-26.

The Solicitor General devotes some energy to resisting the "race to the bottom" scenario—but her arguments are pure *ipse dixit*, unsupported by the record, the law, or common sense. She claims, for example, that "police and prosecutors already have ample incentives to use precisely articulated warnings in a standardized format because of the safe harbor such warnings provide." U.S. Br. at 15. Obviously, Tampa itself was not persuaded by any such incentives. But more important, the "ample incentives" to which the Solicitor General refers are the decisions of this Court holding that deviation from the substance of the *Miranda* warning will result in exclusion of the confession. If this Court upholds the Tampa warning as constitutionally adequate, police and prosecutors will have *no* incentive to adhere to the familiar warning—which unambiguously advises suspects that they may have a lawyer present during questioning—and *every* incentive to adopt a warning like Tampa's, which advises suspects at most that they can go talk to a lawyer between questions if they wish. Nobody

with passing familiarity with police practices could believe that law enforcement agencies will readily forgo the chance to interrogate suspects without a lawyer physically present in the room.

In short, contrary to the assertions by the Solicitor General, the best way to ensure that "police and prosecutors * * * have adequate incentives" to use full-form *Miranda* warnings is to affirm the decision below and thus confirm that this kind of systematic departure from *Miranda* is not worth the "litigation risks" it creates.

Just as important as the effect of this case on law enforcement incentives is its effect on the courts. As explained above, the decisional framework provided by *Miranda* is a significant source of its constitutional value. It is only because of the "ease and clarity of its application" by courts that the rule of *Miranda* creates the necessary incentives for police to respect Fifth Amendment rights. A more vague, less determinate rule would increase the likelihood that a reviewing court would not bar a confession resulting from an inadequate warning—and thus would encourage police to push the boundaries of *Miranda*, rather than comply strictly to it. See *supra* at 21.

To encourage departures like the one at issue here—and to permit them is to encourage them—is to begin the erosion of that "ease and clarity." Once attention to the words themselves is forsaken in favor of the "totality of the warning" inquiry, the bright line of *Miranda* will become increasingly dim. What, after all, does the totality of the warning include? Reversal here would convey that law enforcement can obscure the required warnings—or omit language making them clear—as long as the warning can still

arguably be read to *imply* the existence of the right. What else the totality of the warning might include is anybody's guess. The inquisitor's tone of voice? The physical circumstances in which the warning is given? Once started down that road, it is no great distance to the hopelessly fact-dependent, non-administrable "voluntariness" inquiry to which *Miranda* was a necessary antidote.[6] See *Prysock*, 453 U.S. at 359 (describing as "one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness" of a confession).

The literal words of *Miranda* may not be "talismanic," and there may be no magic words—apart from *Miranda*'s own—that actually make or break a warning's compliance with the Fifth Amendment. But the Solicitor General is wrong to suggest that the words of a *Miranda* warning can be coherently divorced from its substance. *Miranda*, after all, is about the necessity of an explicit verbal warning—and the words of a warning *are* its substance. This Court has held that *Miranda* permits some linguistic flexibility, but it does not follow that a law enforcement agency should be permitted to exploit that flexibility to adopt a calculated, systematic departure from the substance of *Miranda*'s protection, or even a calculated, systematic effort to obfuscate those protections through clever word-play. To hold otherwise

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[6] Of course, if a confession was involuntary, it is inadmissible regardless of the adequacy of the *Miranda* warning. But the failure to administer a fully effective warning gives rise to an irrebutable "presumption of coercion." *United States* v. *Patane*, 542 U.S. 630, 639 (2004).

is to doom *Miranda* to death by a thousand cuts. The Court should not countenance that result.

CONCLUSION

For all these reasons, NADCL and NAFD respectfully ask that this Court affirm the judgment of the Supreme Court of Florida.

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OCTOBER 2009